

08:25:16

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

CISCO SYSTEMS, INC., ) CV-14-5344-BLF  
)  
PLAINTIFF, ) SAN JOSE, CALIFORNIA  
)  
VS. ) DECEMBER 12, 2016  
)  
ARISTA NETWORKS, INC., ) VOLUME 13  
) \*REDACTED\*  
DEFENDANT ) PAGES 2656-2822  
\_\_\_\_\_ )

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE BETH LABSON FREEMAN  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: QUINN, EMANUEL, URQUHART & SULLIVAN  
BY: DAVID A. NELSON  
500 WEST MADISON STREET, SUITE 2450  
CHICAGO, IL 60661

FOR THE PLAINTIFF: QUINN, EMANUEL, URQUHART & SULLIVAN  
BY: SEAN PAK  
50 CALIFORNIA STREET, 22ND FLOOR  
SAN FRANCISCO, CALIFORNIA 94111

APPEARANCES CONTINUED ON NEXT PAGE

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR  
CERTIFICATE NUMBER 13185

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY  
TRANSCRIPT PRODUCED WITH COMPUTER

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APPEARANCES (CONTINUED)

FOR THE DEFENDANT: KEKER & VAN NEST, LLP  
BY: ROBERT ADDY VAN NEST  
BRIAN FERRALL  
DAVID J. SILBERT  
ELIZABETH K. MCCLOSKEY  
EDUARDO E. SANTACANA  
RYAN WONG  
DAVID J. ROSEN  
633 BATTERY STREET  
SAN FRANCISCO, CA 94111-1809

SAN JOSE, CALIFORNIA

DECEMBER 12, 2016

P R O C E E D I N G S

(COURT CONVENED AT 8:59 A.M.)

THE COURT: WE ARE ON THE RECORD OUTSIDE THE PRESENCE  
OF THE JURY.

I UNDERSTOOD THERE WAS ONE MATTER BEFORE WE BROUGHT THE  
JURY IN; IS THAT CORRECT?

MR. NELSON: YES, JUST BRIEFLY.

THE COURT: GOOD MORNING, MR. NELSON.

MR. NELSON: GOOD MORNING.

THE COURT: GOOD MORNING.

MS. SULLIVAN: GOOD MORNING, YOUR HONOR.

VERY BRIEFLY. WE JUST WANT TO ADVISE THE COURT THAT, AS  
PROMISED ON FRIDAY, WHEN WE MADE OUR MOTION FOR JUDGMENT AS A  
MATTER OF LAW UNDER RULE 50(A), WE HAVE FILED A BRIEF IN  
SUPPORT OF THAT MOTION AND IT IS AT DOCKET 732.

THE COURT: I HAVE IT RIGHT HERE. I'VE TAKEN A LOOK  
AT IT.

MS. SULLIVAN: THANK YOU, YOUR HONOR.

AND JUST FOR THE RECORD, YOUR HONOR, WE RESERVED OUR RIGHT  
TO OBJECT TO ANY INSTRUCTIONS THAT WERE FINALIZED SUBSEQUENT TO  
THURSDAY. CISCO WOULD, RESPECTFULLY, LIKE TO LODGE ONE  
OBJECTION, ADDITIONALLY --

THE COURT: OF COURSE.

MS. SULLIVAN: -- TO INSTRUCTION NUMBER 39.

09:01:06 1 INSOFAR AS INSTRUCTION NUMBER 39 REFERS AS ONE OF THE  
09:01:10 2 UNPROTECTABLE ELEMENTS TO ANY SINGLE MULTIWORD COMMAND, AS  
09:01:15 3 ITEM 2 IN THE LIST OF UNPROTECTED ITEMS, CISCO RESPECTFULLY  
09:01:19 4 OBJECTS TO THAT ON THE GROUND THAT EVEN A SINGLE MULTIWORD  
09:01:24 5 COMMAND IS INDEPENDENTLY PROTECTABLE AS AN ORIGINAL WORK WHEN  
09:01:29 6 IT IS CREATED FROM -- CREATED BY CISCO'S OWN AUTHORSHIP.

09:01:36 7 "IT WAS THE BEST OF TIMES, IT WAS THE WORST OF TIMES," IS  
09:01:40 8 A SENTENCE COMPOSED OF COMMON WORDS, BUT IT'S NONETHELESS  
09:01:43 9 ORIGINAL.

09:01:44 10 SO WITH RESPECT TO ITEM 2, ANY SINGLE MULTIWORD COMMAND  
09:01:47 11 CISCO RESPECTFULLY OBJECTS TO INCLUDING THAT IN THE LIST OF  
09:01:51 12 UNPROTECTABLE ELEMENTS.

09:01:52 13 THE COURT: THANK YOU. AND THAT OBJECTION IS  
09:01:54 14 CERTAINLY NOTED ON THE RECORD.

09:01:55 15 I WILL ONLY COMMENT THAT THAT DECISION IS LARGELY MADE  
09:01:59 16 BASED UPON YOUR OWN BRIEFING ON THE TOPIC OF ANALYTIC  
09:02:02 17 DISSECTION, WHERE I BELIEVE THAT YOU ASKED FOR PROTECTION OF  
09:02:06 18 THE BUILDING BLOCK ITSELF AND NOT THE INDIVIDUAL LINES.

09:02:10 19 BUT YOUR OBJECTION IS CLEARLY NOTED AND THAT WILL MOVE ON  
09:02:12 20 TO ANOTHER TIME.

09:02:13 21 MS. SULLIVAN: THANK YOU, YOUR HONOR.

09:02:14 22 THE COURT: ALL RIGHT. THANK YOU.

09:02:14 23 AND I DID RECEIVE THE MOTION, AS MS. SULLIVAN INDICATED, I  
09:02:22 24 HAVE REVIEWED IT, I WILL DEFER ANY RULING UNTIL AFTER THE JURY  
09:02:25 25 RETURNS A VERDICT, AND THANK YOU FOR FILING THAT.

09:02:27 1 MR. VAN NEST, ANYTHING YOU WOULD LIKE TO PUT ON THE RECORD  
09:02:29 2 BEFORE THE JURY COMES IN?

09:02:31 3 MR. VAN NEST: NO, YOUR HONOR. WE ARE ALL SET.

09:02:33 4 THE COURT: OKAY. LET ME JUST MAKE A COMMENT.

09:02:37 5 THE WAY THE JURY INSTRUCTIONS HAVE BEEN SUBMITTED, AND  
09:02:40 6 THEY ARE IN EXCELLENT SHAPE, I HAD A SET OF PRELIMINARY  
09:02:43 7 INSTRUCTIONS THAT BEGAN ON PAGE 1, AND A SET OF FINAL  
09:02:46 8 INSTRUCTIONS THAT BEGAN ON ANOTHER PAGE 1. THEY WILL JUST GO  
09:02:50 9 IN THAT WAY. I HADN'T NOTICED THAT UNTIL THIS MORNING.

09:02:52 10 AND I HAD A TABLE -- THIS IS A QUESTION FOR YOU -- THERE  
09:02:56 11 IS A TABLE OF CONTENTS FOR THE FINAL SET, BUT THERE IS NOT ONE  
09:02:59 12 FOR THE PRELIMINARY.

09:03:00 13 I'M GLAD TO INCLUDE THIS AND TO GIVE THESE TO THE JURY IN  
09:03:05 14 TWO BATCHES, PRELIMINARY AND FINAL. BUT I JUST -- I SAW THAT  
09:03:12 15 ASYMMETRY, IT'S OF NO MOMENT TO ME, I JUST WANTED TO POINT IT  
09:03:16 16 OUT TO SEE IF THERE'S ANY CONCERN.

09:03:18 17 MR. VAN NEST: WE DON'T HAVE ANY CONCERN, YOUR HONOR.

09:03:20 18 WAS YOUR HONOR PLANNING TO READ THE PRELIMINARY  
09:03:23 19 INSTRUCTIONS?

09:03:24 20 THE COURT: I AM NOT. I HAVE DONE THAT ALREADY.

09:03:26 21 MR. VAN NEST: WE ARE FINE AS IS.

09:03:27 22 THE COURT: OKAY. AND GIVE THEM THE TABLE OF  
09:03:29 23 CONTENTS TO THE FINAL.

09:03:31 24 MR. VAN NEST: SURE.

09:03:32 25 THE COURT: OKAY. MR. NELSON, YOU AGREE?

09:03:33 1 MR. NELSON: THAT'S PERFECTLY FINE, YOUR HONOR.

09:03:35 2 THE COURT: IT'S FINE WITH ME TOO, IT'S JUST -- YOU  
09:03:38 3 CAN LOOK AT THESE THINGS A HUNDRED TIMES AND STILL FIND  
09:03:42 4 SOMETHING ELSE THAT YOU COULD DO DIFFERENTLY.

09:03:44 5 AND THE VERDICT FORM, OF COURSE, I HAVE THAT AS WELL.

09:03:46 6 OKAY. I THINK THEN THAT'S EVERYTHING. AND IS OUR JURY  
09:03:50 7 HERE?

09:03:51 8 THE CLERK: WE ARE STILL MISSING ONE.

09:03:54 9 THE COURT: OKAY.

09:09:17 10 (COURT CONVENED AT 9:05 A.M.)

09:09:17 11 THE COURT: GOOD MORNING, EVERYONE. PLEASE BE  
09:09:18 12 SEATED.

09:09:19 13 WE ARE ON THE RECORD AND ALL OF OUR JURORS ARE HERE.

09:09:29 14 ALL RIGHT. WHEN WE FINISHED ON FRIDAY, I TOLD YOU THAT  
09:09:32 15 THE PARTIES HAD COMPLETED THE PRESENTATION OF THE EVIDENCE.  
09:09:36 16 AND SO TODAY WE ARE GOING TO MOVE INTO THE LAST PHASE OF THE  
09:09:40 17 COURTROOM PART OF THE TRIAL.

09:09:42 18 I'M GOING TO READ TO YOU THE FINAL JURY INSTRUCTIONS.  
09:09:47 19 THEY ARE RELATIVELY LONG, AND I KNOW YOU WILL LISTEN CAREFULLY.  
09:09:51 20 AND YOU ARE FREE TO TAKE NOTES ON THEM IF YOU WISH.

09:09:53 21 YOU WILL RECEIVE COPIES OF THE JURY INSTRUCTIONS IN THE  
09:09:56 22 JURY ROOM, SO YOU DON'T HAVE TO WORRY ABOUT THEM GOING BY SO  
09:10:00 23 FAST. SO IT'S COMPLETELY UP TO YOU AS TO WHETHER NOTE TAKING  
09:10:04 24 IS HELPFUL TO YOU AT THIS POINT.

09:10:07 25 WHEN I'M DONE READING THE JURY INSTRUCTIONS, WE WILL TAKE

09:10:09 1 A SHORT BREAK. THIS IS PARTICULARLY CHALLENGING FOR OUR COURT  
09:10:14 2 REPORTER BECAUSE WHEN I READ THE INSTRUCTIONS, AND THEN THE  
09:10:17 3 LAWYERS GIVE CLOSING ARGUMENTS, SO THERE AREN'T THE NORMAL  
09:10:21 4 BREAKS THAT YOU GET IN QUESTIONS AND ANSWERS. AND SO IT GOES  
09:10:24 5 PRETTY QUICKLY AND SHE NEEDS A BREAK, AND ALL OF US DON'T MIND  
09:10:28 6 A LITTLE STRETCH AFTER ABOUT AN HOUR ANYWAY. AND THEN I WON'T  
09:10:31 7 HAVE TO INTERRUPT THE FINAL ARGUMENTS OF THE ATTORNEYS.

09:10:35 8 AND SO WHAT I'M GOING TO DO IS READ TO YOU THE  
09:10:38 9 INSTRUCTIONS ON THE LAW. I AM GOING TO REPEAT A FEW OF THE  
09:10:42 10 INSTRUCTIONS I GAVE YOU TWO WEEKS AGO WHEN WE STARTED, ABOUT  
09:10:46 11 THE EVIDENCE. AND IT'S JUST A TYPICAL WAY OF REORIENTING YOU  
09:10:53 12 INTO THE INSTRUCTIONS.

09:10:53 13 I'M GOING TO STOP RIGHT BEFORE I TELL YOU WHAT TO DO IN  
09:10:57 14 THE DELIBERATION ROOM. IT MAY BE THE THING YOU ARE MOST  
09:11:00 15 INTERESTED IN, BUT I'M GOING TO DO THAT RIGHT BEFORE I SEND YOU  
09:11:03 16 OFF INTO THE JURY ROOM TO DELIBERATE, AND I WILL GIVE YOU  
09:11:06 17 LENGTHY INSTRUCTIONS AND COMMENTS ABOUT WHAT YOU DO IN THE JURY  
09:11:10 18 ROOM. SO THAT WILL COME THIS AFTERNOON WHEN THE CLOSING  
09:11:14 19 ARGUMENTS ARE DONE.

09:11:17 20 AS YOU'VE SEEN THROUGHOUT THE TRIAL, THE ATTORNEYS HAVE  
09:11:20 21 BEEN ON A SCHEDULE. WE TALKED ABOUT THAT AND WORKED OUT A  
09:11:24 22 REASONABLE SCHEDULE FOR THE TRIAL, AND THE SAME GOES FOR THE  
09:11:29 23 CLOSING ARGUMENTS. THEY HAVE A CERTAIN AMOUNT OF TIME THAT  
09:11:31 24 THEY'VE REQUESTED, AND THAT I'VE AGREED TO FOR THEIR CLOSING  
09:11:35 25 ARGUMENTS, AND THEY WILL BE WORKING ON THAT SCHEDULE, THAT'S

09:11:38 1 WHAT IS DONE IN ALL FEDERAL TRIALS.

09:11:41 2 AND SO I HAVE REASONABLE CERTAINTY AS TO WHEN WE WILL  
09:11:44 3 CONCLUDE. WE WON'T FINISH THE CLOSING ARGUMENTS BEFORE LUNCH.  
09:11:49 4 THERE'S JUST NOT QUITE ENOUGH TIME TO GET THAT DONE.

09:11:52 5 SO WE WILL GO UNTIL ABOUT AN HOUR TO ABOUT 10:00 WITH  
09:11:59 6 THIS, TAKE A SHORT BREAK. COME BACK IN, THE PLAINTIFF WILL  
09:12:03 7 START WITH THEIR INITIAL CLOSING ARGUMENT. WE WILL TAKE  
09:12:05 8 ANOTHER SHORT BREAK. WE WILL LET ARISTA BEGIN ITS CLOSING  
09:12:09 9 ARGUMENT, I DON'T THINK THEY WILL GET TO FINISH BEFORE LUNCH.  
09:12:14 10 WE WILL TAKE OUR LUNCH BREAK, COME BACK, FINISH UP, AND I  
09:12:17 11 EXPECT YOU WILL HAVE THIS CASE BY MID-AFTERNOON.

09:12:20 12 LET ME JUST ALSO COMMENT, AND I MAY SAY THIS AGAIN LATER,  
09:12:25 13 AS I'VE SAID TO YOU BEFORE, NOTHING THE ATTORNEYS SAY IS  
09:12:28 14 EVIDENCE, BUT WHAT THEY SAY TO YOU IN CLOSING ARGUMENT IS VERY  
09:12:32 15 IMPORTANT. IT IS THEIR OPPORTUNITY TO DISCUSS WITH YOU THEIR  
09:12:36 16 VIEW OF THE EVIDENCE AND HOW YOU MIGHT CONSIDER IT.

09:12:40 17 THEY ALSO WILL BE TALKING ABOUT CERTAIN EVIDENCE THAT THEY  
09:12:44 18 FIND PARTICULARLY IMPORTANT TO THE POINTS THEY ARE TRYING TO  
09:12:47 19 PERSUADE YOU ON. AND THEY MAY MENTION EXHIBITS BY NUMBER.

09:12:52 20 AS YOU NOTICED DURING THE TRIAL, THERE WERE A LOT OF  
09:12:55 21 EXHIBITS. YOU WILL BE RECEIVING A LIST OF EXHIBITS WITH A  
09:12:59 22 BRIEF DESCRIPTION OF IT, AND THE EXHIBITS I WILL EXPLAIN TO  
09:13:02 23 YOU, WILL BE GIVEN TO YOU ELECTRONICALLY.

09:13:04 24 YOU MIGHT FIND IT WORTH YOUR WHILE TO JOT DOWN SOME  
09:13:09 25 EXHIBIT NUMBERS IF WHEN YOU'RE LISTENING IF YOU FIND THAT THOSE



09:13:12 1 EXHIBITS MIGHT BE SOMETHING YOU PARTICULARLY WANT TO GO IN AND  
09:13:16 2 LOOK AT.

09:13:16 3 YOU WILL NOT HAVE A TRANSCRIPT OF THE LAWYER'S CLOSING  
09:13:19 4 ARGUMENTS. SO I JUST COMMENT THAT IT MAY BE HELPFUL TO YOU TO  
09:13:24 5 WRITE SOME THINGS DOWN.

09:13:25 6 BY THE SAME TOKEN, THE LAWYERS MAY MENTION SOME NUMBERS TO  
09:13:29 7 YOU THROUGHOUT THEIR CLOSING ARGUMENTS, AND THEY MIGHT, AS  
09:13:33 8 YOU'VE SEEN, THEY'VE HAD SOME NICE DISPLAYS THAT HAVE BEEN AN  
09:13:42 9 OPPORTUNITY FOR THEM TO ILLUSTRATE TO YOU WHAT THEY ARE SAYING  
09:13:47 10 WITH WORDS, AND THOSE THINGS DON'T GO INTO THE JURY ROOM  
09:13:50 11 EITHER.

09:13:50 12 SO IF YOU SEE THINGS WRITTEN DOWN OR YOU HEAR THINGS THAT  
09:13:54 13 ARE OF PARTICULAR INTEREST TO YOU, AGAIN, YOU MAY WISH TO TAKE  
09:13:57 14 NOTES. I JUST WOULD HATE FOR YOU TO GET TO THE JURY ROOM AND  
09:14:01 15 SAY, WELL, NOW WHERE ARE THOSE NICE PICTURES I SAW, ONLY TO  
09:14:05 16 LEARN THEY DON'T COME IN AND YOU CAN'T REMEMBER THE PRECISE  
09:14:08 17 STATEMENT THAT WAS MADE TO GO ALONG WITH IT.

09:14:11 18 SO JUST A SUGGESTION, BUT YOU KNOW, NOTES ARE NOT  
09:14:15 19 REQUIRED, YOU MIGHT NOT FIND -- YOU MIGHT FIND YOUR OWN MEMORY  
09:14:18 20 IS JUST EXACTLY WHAT YOU NEED AND THAT'S PERFECT. YOU MIGHT  
09:14:21 21 TAKE NOTES, YOU SEE ME, I TAKE NOTES ALL THE TIME. IT'S NOT  
09:14:25 22 THAT I READ THEM, IT'S JUST THAT IT HELPS ME TO REMEMBER IT  
09:14:27 23 WHILE IT'S GOING ON. IT'S JUST TECHNIQUES THAT WE ALL USE.

09:14:31 24 SO THOSE ARE MY SUGGESTIONS. I'M GOING TO HOPE MY VOICE  
09:14:36 25 HOLDS OUT, I THINK I'M DOING PRETTY WELL, AND GIVE YOU THESE

09:14:39 1 JURY INSTRUCTIONS.

09:14:46 2 MEMBERS OF THE JURY, NOW THAT YOU HAVE HEARD ALL -- I'M  
09:14:50 3 GOING TO START OUT BADLY -- NOW THAT YOU HAVE HEARD THE  
09:14:59 4 EVIDENCE AND WILL HEAR THE ARGUMENTS OF THE ATTORNEYS, IT IS MY  
09:15:03 5 DUTY TO INSTRUCT YOU ON THE LAW THAT APPLIES TO THIS CASE.

09:15:06 6 A COPY OF THESE INSTRUCTIONS WILL BE SENT TO THE JURY ROOM  
09:15:09 7 FOR YOU TO CONSULT DURING YOUR DELIBERATIONS.

09:15:13 8 IT IS YOUR DUTY TO FIND THE FACTS FROM ALL THE EVIDENCE IN  
09:15:17 9 THE CASE. TO THOSE FACTS, YOU WILL APPLY THE LAW AS I NOW GIVE  
09:15:20 10 IT TO YOU. YOU MUST FOLLOW THE LAW AS I GIVE IT TO YOU WHETHER  
09:15:25 11 YOU AGREE WITH IT OR NOT. AND YOU MUST NOT BE INFLUENCED BY  
09:15:28 12 ANY PERSONAL LIKES OR DISLIKES, OPINIONS, PREJUDICES OR  
09:15:32 13 SYMPATHY. THAT MEANS THAT YOU MUST DECIDE THE CASE SOLELY ON  
09:15:38 14 THE EVIDENCE BEFORE YOU. YOU WILL RECALL THAT YOU TOOK AN OATH  
09:15:41 15 TO DO SO.

09:15:42 16 PLEASE DO NOT READ INTO THESE INSTRUCTIONS, OR ANYTHING  
09:15:45 17 THAT I MAY HAVE SAID OR DONE, THAT I HAVE AN OPINION REGARDING  
09:15:49 18 THE EVIDENCE OF WHAT YOUR VERDICT SHOULD BE.

09:15:55 19 THE EVIDENCE YOU ARE TO DECIDE THE FACTS ARE -- THE  
09:16:06 20 EVIDENCE YOU ARE TO CONSIDER IN DECIDING THE FACTS CONSISTS OF,  
09:16:10 21 THE SWORN TESTIMONY OF ANY WITNESS, THE EXHIBITS THAT ARE  
09:16:13 22 ADMITTED INTO EVIDENCE, ANY FACTS TO WHICH THE LAWYERS HAVE  
09:16:17 23 AGREED, AND ANY FACTS THAT I HAVE INSTRUCTED YOU TO ACCEPT AS  
09:16:24 24 PROVED.

09:16:27 25 IN REACHING YOUR VERDICT, YOU MAY CONSIDER ONLY THE

09:16:29 1 TESTIMONY AND EXHIBITS RECEIVED INTO EVIDENCE. CERTAIN THINGS  
09:16:31 2 ARE NOT EVIDENCE AND YOU MAY NOT CONSIDER THEM IN DECIDING WHAT  
09:16:34 3 THE FACTS ARE.

09:16:38 4 ARGUMENTS AND STATEMENTS BY LAWYERS ARE NOT EVIDENCE. THE  
09:16:42 5 LAWYERS ARE NOT WITNESSES. WHAT THEY HAVE SAID IN THEIR  
09:16:45 6 OPENING STATEMENTS AND WILL SAY IN THEIR CLOSING ARGUMENTS AND  
09:16:50 7 AT OTHER TIMES IS INTENDED TO HELP YOU INTERPRET THE EVIDENCE,  
09:16:53 8 BUT IT IS NOT EVIDENCE. IF THE FACTS AS YOU REMEMBER THEM  
09:16:57 9 DIFFER FROM THE WAY THE LAWYERS HAVE STATED THEM, YOUR MEMORY  
09:16:59 10 OF THEM CONTROLS.

09:17:02 11 QUESTIONS AND OBJECTIONS BY LAWYERS ARE NOT EVIDENCE.  
09:17:06 12 ATTORNEYS HAVE A DUTY TO THEIR CLIENTS TO OBJECT WHEN THEY  
09:17:10 13 BELIEVE A QUESTION IS IMPROPER UNDER THE RULES OF EVIDENCE.  
09:17:16 14 YOU SHOULD NOT BE INFLUENCED BY THE OBJECTION OR BY THE COURT'S  
09:17:19 15 RULING ON IT.

09:17:20 16 TESTIMONY AND EXHIBITS THAT HAVE BEEN EXCLUDED OR STRICKEN  
09:17:23 17 OR THAT YOU HAVE BEEN INSTRUCTED TO DISREGARD ARE NOT EVIDENCE  
09:17:28 18 AND MUST NOT BE CONSIDERED.

09:17:31 19 IN ADDITION, SOME EVIDENCE MAY BE RECEIVED ONLY FOR A  
09:17:34 20 LIMITED PURPOSE. WHEN I GIVE A LIMITING INSTRUCTION, YOU MUST  
09:17:38 21 FOLLOW IT.

09:17:40 22 ANYTHING YOU MAY HAVE SEEN OR HEARD WHEN COURT WAS NOT IN  
09:17:43 23 SESSION IS NOT EVIDENCE. YOU ARE TO DECIDE THE CASE SOLELY ON  
09:17:47 24 THE EVIDENCE RECEIVED AT THE TRIAL.

09:17:53 25 SOME WITNESSES, BECAUSE OF EDUCATION OR EXPERIENCE, ARE

09:17:55 1 PERMITTED TO STATE OPINIONS AND THE REASONS FOR THOSE OPINIONS.

09:18:00 2 SUCH OPINION TESTIMONY SHOULD BE JUDGED LIKE ANY OTHER  
09:18:03 3 TESTIMONY. YOU MAY ACCEPT IT OR REJECT IT, AND GIVE IT AS MUCH  
09:18:08 4 WEIGHT AS YOU THINK IT DESERVES, CONSIDERING THE WITNESS'S  
09:18:12 5 EDUCATION AND EXPERIENCE, THE REASONS GIVEN FOR THE OPINION AND  
09:18:15 6 AUGUST THE OTHER EVIDENCE IN THE CASE.

09:18:19 7 CERTAIN CHARTS AND SUMMARIES ARE NOT ADMITTED INTO  
09:18:22 8 EVIDENCE AND HAVE BEEN SHOWN TO YOU IN ORDER TO HELP EXPLAIN  
09:18:24 9 THE CONTENTS OF BOOKS, RECORDS, DOCUMENTS OR OTHER EVIDENCE IN  
09:18:28 10 THE CASE.

09:18:34 11 CHARTS AND SUMMARIES ARE ONLY AS GOOD AS THE UNDERLYING  
09:18:38 12 EVIDENCE THAT SUPPORTS THEM. YOU SHOULD, THEREFORE, GIVE THEM  
09:18:41 13 ONLY SUCH WEIGHT AS YOU THINK THE UNDERLYING EVIDENCE DESERVES.

09:18:48 14 CERTAIN CHARTS AND SUMMARIES HAVE BEEN ADMITTED INTO  
09:18:53 15 EVIDENCE TO ILLUSTRATE INFORMATION BROUGHT OUT IN THE TRIAL.  
09:18:55 16 CHARTS AND SUMMARIES ARE ONLY AS GOOD AS THE TESTIMONY OR OTHER  
09:18:59 17 ADMITTED EVIDENCE THAT SUPPORTS THEM. YOU SHOULD, THEREFORE,  
09:19:01 18 GIVE THEM ONLY SUCH WEIGHT AS YOU THINK THE UNDERLYING EVIDENCE  
09:19:06 19 DESERVES.

09:19:10 20 WHEN A PARTY HAS THE BURDEN OF PROOF ON ANY CLAIM OR  
09:19:14 21 AFFIRMATIVE DEFENSE BY PREPONDERANCE OF THE EVIDENCE, IT MEANS  
09:19:19 22 YOU MUST BE PERSUADED BY THE EVIDENCE THAT THE CLAIM OR  
09:19:23 23 AFFIRMATIVE DEFENSE IS MORE PROBABLY TRUE THAN NOT TRUE.  
09:19:27 24 PREPONDERANCE OF THE EVIDENCE BASICALLY MEANS MORE LIKELY THAN  
09:19:29 25 NOT. YOU SHOULD BASE YOUR DECISION ON ALL OF THE EVIDENCE,

REGARDLESS OF WHICH PARTY PRESENTED IT.

COPYRIGHT IS THE EXCLUSIVE RIGHT TO COPY. THIS RIGHT TO COPY INCLUDES THE EXCLUSIVE RIGHTS TO OR TO AUTHORIZE OTHERS TO:

1. REPRODUCE THE COPYRIGHTED WORK IN COPIES.

2. RECAST OR ADAPT THE WORK. THAT IS, PREPARE DERIVATIVE WORKS BASED UPON THE COPYRIGHTED WORK.

3. DISTRIBUTE COPIES OF THE COPYRIGHTED WORK TO THE PUBLIC BY SALE OR OTHER TRANSFER OF OWNERSHIP.

4. DISPLAY PUBLICLY A COPYRIGHTED WORK.

IT IS THE OWNER OF A COPYRIGHT WHO MAY EXERCISE THESE EXCLUSIVE RIGHTS.

THE TERM "OWNER" INCLUDES THE AUTHOR OF THE WORK. IN GENERAL, COPYRIGHT LAW PROTECTS AGAINST REPRODUCTION, ADAPTATION, DISTRIBUTION, OR DISPLAY OF INFRINGING COPIES OF THE OWNER'S COPYRIGHTED WORK WITHOUT THE OWNER'S PERMISSION. AN OWNER MAY ENFORCE THESE RIGHTS TO EXCLUDE OTHERS IN AN ACTION FOR COPYRIGHT INFRINGEMENT.

THE COPYRIGHTED WORKS INVOLVED IN THIS TRIAL ARE:

1. CISCO'S FOUR USER INTERFACES FOR IOS, IOS XR, IOS XE, AND NX-OS.

2. CISCO'S TECHNICAL MANUALS.

YOU ARE INSTRUCTED THAT A COPYRIGHT MAY BE OBTAINED IN USER INTERFACES AND TECHNICAL MANUALS.

COPYRIGHT LAW ALLOWS THE AUTHOR OF AN ORIGINAL WORK TO

09:21:23 1 STOP OTHERS FROM COPYING THE ORIGINAL EXPRESSION IN THE  
09:21:28 2 AUTHOR'S WORK. ONLY THE PARTICULAR EXPRESSION OF AN IDEA CAN  
09:21:32 3 BE COPYRIGHTED AND PROTECTED.

09:21:35 4 COPYRIGHT LAW DOES NOT GIVE THE AUTHOR THE RIGHT TO  
09:21:38 5 PREVENT OTHERS FROM COPYING OR USING THE UNDERLYING IDEAS  
09:21:42 6 CONTAINED IN THE WORK, SUCH AS ANY PROCEDURES, PROCESSES,  
09:21:45 7 SYSTEMS, METHODS OF OPERATION, CONCEPTS, PRINCIPLES OR  
09:21:51 8 DISCOVERIES.

09:21:58 9 ANYONE WHO COPIES ORIGINAL PROTECTABLE EXPRESSION FROM A  
09:22:04 10 COPYRIGHTED WORK DURING THE TERM OF THE COPYRIGHT WITHOUT THE  
09:22:08 11 OWNER'S PERMISSION INFRINGES THE COPYRIGHT.

09:22:12 12 CISCO HAS THE BURDEN OF PROVING BY A PREPONDERANCE OF THE  
09:22:16 13 EVIDENCE THAT:

09:22:17 14 1. CISCO IS THE OWNER OF A VALID COPYRIGHT.

09:22:21 15 2. ARISTA COPIED ORIGINAL, PROTECTABLE EXPRESSION FROM  
09:22:24 16 THE COPYRIGHTED WORK.

09:22:29 17 CISCO IS THE OWNER OF VALID COPYRIGHTS IN ITS FOUR USER  
09:22:33 18 INTERFACES FOR IOS, IOS XR, IOS XE AND NX-OS AND RELATED  
09:22:42 19 DOCUMENTATION IF CISCO PROVES BY A PREPONDERANCE OF THE  
09:22:47 20 EVIDENCE THAT:

09:22:48 21 1. CISCO'S WORKS ARE ORIGINAL.

09:22:51 22 2. CISCO IS THE AUTHOR OR CREATOR OF THE WORKS, OR THE  
09:22:54 23 AUTHOR OR CREATOR ASSIGNED OR EXCLUSIVELY LICENSED THE WORKS TO  
09:23:01 24 CISCO.

09:23:05 25 A COPYRIGHT OWNER MAY OBTAIN A CERTIFICATE OF REGISTRATION

FROM THE COPYRIGHT OFFICE. THE EVIDENCE IN THIS CASE INCLUDES  
26 CERTIFICATES OF COPYRIGHT REGISTRATION FROM THE COPYRIGHT  
OFFICE FOR CISCO'S COPYRIGHTED WORKS.

IF YOU FIND THAT A CERTIFICATE WAS MADE WITHIN FIVE YEARS  
AFTER FIRST PUBLICATION OF THAT WORK, YOU MAY CONSIDER THAT  
CERTIFICATE AS EVIDENCE OF THE FACTS STATED IN IT.

FROM THE CERTIFICATE, YOU MAY, BUT NEED NOT, CONCLUDE THAT  
THE WORK IS ORIGINAL AND COPYRIGHTABLE AND THAT CISCO OWNS THE  
COPYRIGHT IN THAT WORK.

AN ORIGINAL WORK MAY INCLUDE OR INCORPORATE ELEMENTS TAKEN  
FROM PRIOR WORKS, FROM THE PUBLIC DOMAIN, AND/OR WORKS OWNED BY  
OTHERS WITH THE OWNER'S PERMISSION. THE ORIGINAL PARTS OF  
PLAINTIFF'S WORK ARE THE PARTS CREATED:

1. INDEPENDENTLY BY THE WORK'S AUTHOR. THAT IS, THE  
AUTHOR DID NOT COPY IT FROM ANOTHER WORK.

2. BY USE OF AT LEAST SOME MINIMAL CREATIVITY.

IN COPYRIGHT LAW, THE ORIGINAL PART OF THE WORK NEED NOT  
BE NEW OR NOVEL.

AN OWNER IS ENTITLED TO COPYRIGHT PROTECTION OF A  
COMPILATION. A "COMPILATION" IS A WORK FORMED BY THE  
COLLECTION AND ASSEMBLING OF PRE-EXISTING MATERIALS OR OF DATA  
THAT ARE SELECTED, COORDINATED, OR ARRANGED IN SUCH A WAY THAT  
THE RESULTING WORK AS A WHOLE CONSTITUTES AN ORIGINAL WORK OF  
AUTHORSHIP.

THE OWNER OF A COMPILATION MAY ENFORCE THE RIGHT TO

09:24:53 1 EXCLUDE OTHERS IN AN ACTION FOR COPYRIGHT INFRINGEMENT.

09:24:59 2 THE CREATOR OF AN ORIGINAL WORK IS CALLED THE AUTHOR OF  
09:25:05 3 THAT WORK. AN AUTHOR ORIGINATES OR MASTERMINDS THE ORIGINAL  
09:25:09 4 WORK CONTROLLING THE WHOLE WORK'S CREATION AND CAUSING IT TO  
09:25:12 5 COME INTO BEING.

09:25:13 6 A COPYRIGHT OWNER IS ENTITLED TO EXCLUDE OTHERS FROM  
09:25:16 7 COPYING A WORK MADE FOR HIRE. A "WORK MADE FOR HIRE" IS ONE  
09:25:19 8 THAT IS PREPARED BY AN EMPLOYEE AND IS WITHIN THE SCOPE OF  
09:25:23 9 EMPLOYMENT.

09:25:31 10 A COPYRIGHT OWNER IS ENTITLED TO EXCLUDE OTHERS FROM  
09:25:35 11 CREATING DERIVATIVE WORKS BASED ON THE OWNER'S COPYRIGHTED  
09:25:39 12 WORK.

09:25:40 13 THE TERM DERIVATIVE WORK REFERS TO A WORK BASED ON ONE OR  
09:25:43 14 MORE PRE-EXISTING WORKS, SUCH AS A TRANSLATION, MUSICAL  
09:25:49 15 ARRANGEMENT, DRAMATIZATION, FICTIONALIZATION, MOTION PICTURE  
09:25:53 16 VERSION, SOUND RECORDING, ART REPRODUCTION, ABRIDGEMENT,  
09:25:57 17 CONDENSATION, OR ANY OTHER FORM IN WHICH A WORK MAY BE RECAST  
09:26:02 18 OR ADAPTED.

09:26:04 19 ACCORDINGLY, THE OWNER OF A COPYRIGHTED WORK IS ENTITLED  
09:26:08 20 TO EXCLUDE OTHERS FROM RECASTING OR ADAPTING THE COPYRIGHTED  
09:26:12 21 WORK WITHOUT THE OWNER'S PERMISSION.

09:26:18 22 CISCO HAS THE BURDEN OF PROVING BY A PREPONDERANCE OF THE  
09:26:20 23 EVIDENCE THAT ARISTA COPIED ORIGINAL, PROTECTED ELEMENTS FROM  
09:26:23 24 CISCO'S COPYRIGHTED WORKS.

09:26:26 25 THERE ARE TWO WAYS THAT CISCO CAN MEET ITS BURDEN:



FIRST, CISCO MAY ESTABLISH ARISTA'S COPYING THROUGH DIRECT EVIDENCE. AN EXAMPLE OF DIRECT EVIDENCE WOULD BE AN ADMISSION BY ARISTA THAT PART OR ALL OF THE WORK WAS COPIED. DIRECT EVIDENCE MAY ALSO BE THE CREDIBLE TESTIMONY OF A WITNESS WHO SAW THE WORK BEING COPIED.

ALTERNATIVELY, CISCO MAY SHOW THAT ARISTA COPIED FROM CISCO'S COPYRIGHTED WORKS, THROUGH INDIRECT EVIDENCE BY PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT ONE, ARISTA HAD ACCESS TO CISCO'S COPYRIGHTED WORKS.

AND TWO, THERE IS VIRTUAL IDENTITY BETWEEN ARISTA'S WORKS AND THE ORIGINAL PROTECTED ELEMENTS OF CISCO'S WORKS.

TO ESTABLISH INDIRECT EVIDENCE OF COPYING, CISCO MUST PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT ARISTA HAD ACCESS TO CISCO'S COPYRIGHTED WORKS.

YOU MAY FIND THAT ARISTA HAD ACCESS TO CISCO'S WORKS IF ARISTA HAD A REASONABLE OPPORTUNITY TO VIEW, READ, OR COPY CISCO'S WORKS BEFORE ARISTA'S WORK WAS CREATED.

IF YOU FIND THAT ARISTA DID NOT HAVE ACCESS TO CISCO'S WORKS, YOU MAY STILL FIND THAT ARISTA COPIED CISCO'S WORKS IF THERE ARE STRIKING SIMILARITIES BETWEEN THE PROTECTABLE ELEMENTS OF THE WORKS.

TO ESTABLISH INDIRECT EVIDENCE OF COPYING, CISCO MUST PROVE VIRTUAL IDENTITY IN TWO STEPS. VIRTUAL IDENTITY MEANS DIFFERING BY NO MORE THAN A TRIVIAL DEGREE.

FIRST, CISCO MUST PROVE THAT THERE IS VIRTUAL IDENTITY

09:28:28 1 BETWEEN THE ORIGINAL PROTECTED ELEMENTS OF CISCO'S COPYRIGHTED  
09:28:31 2 WORKS AND THE CORRESPONDING ELEMENTS OF ARISTA'S WORKS THAT  
09:28:36 3 CISCO CLAIMS ARISTA COPIED.

09:28:39 4 IN MAKING THIS COMPARISON, YOU MAY FIND ANY OF THE  
09:28:43 5 FOLLOWING ELEMENTS OF CISCO'S WORKS PROTECTED AS A COMPILATION  
09:28:51 6 IF YOU FIND THEY ARE ORIGINAL.

09:28:54 7 1. THE SELECTION AND ARRANGEMENT OF CISCO'S MULTIWORD  
09:28:57 8 COMMAND LINE EXPRESSIONS.

09:28:59 9 2. THE SELECTION AND ARRANGEMENT OF CISCO'S MODES AND  
09:29:02 10 PROMPTS.

09:29:02 11 3. THE COLLECTION OF CISCO'S SCREEN RESPONSES AND  
09:29:07 12 OUTPUTS.

09:29:07 13 4. THE COLLECTION OF CISCO'S HELP DESCRIPTIONS.

09:29:11 14 5. CISCO'S USER INTERFACES AS A WHOLE AS COMPILATIONS OF  
09:29:17 15 ELEMENTS 1 THROUGH 4.

09:29:19 16 6. EACH OF CISCO'S TECHNICAL MANUALS.

09:29:25 17 IN MAKING THIS COMPARISON, YOU SHOULD NOT CONSIDER THE  
09:29:28 18 FOLLOWING ELEMENTS WHICH ARE NOT PROTECTABLE:

09:29:30 19 1. INDIVIDUAL WORDS USED IN ANY OF THE ASSERTED ELEMENTS.

09:29:36 20 2. ANY SINGLE MULTIWORD COMMAND.

09:29:38 21 3. THE IDEA OR METHOD OF GROUPING OR CLUSTERING COMMANDS  
09:29:42 22 UNDER COMMON INITIAL WORDS, SUCH AS SHOW OR IP.

09:29:54 23 4. ANY COMMAND HIERARCHY.

09:29:56 24 5. SPECIFIC MODES AND SPECIFIC PROMPTS.

09:29:59 25 6. THE IDEA OF A SET PATH WAY THROUGH A SERIES OF MODES.

09:30:03 1 7. THE IDEA OF MAKING CERTAIN COMMANDS AVAILABLE ONLY IN  
09:30:07 2 CERTAIN MODES.

09:30:12 3 8. USE OF COMMAND SYNTAX SUCH AS VERB, OBJECT,  
09:30:17 4 PARAMETERS.

09:30:17 5 THE CHOICE -- I'M SORRY.

09:30:20 6 9. THE CHOICE OF USING A TEXT-BASED USER INTERFACE.

09:30:24 7 10. THE IDEA OF USING MULTIWORD COMMAND EXPRESSIONS TO  
09:30:28 8 MANAGE OR CONFIGURE A DEVICE.

09:30:31 9 11. THE FUNCTION OF ANY ASSERTED FEATURE.

09:30:36 10 12. THE USE OF "?" TO CALL UP HELP DESCRIPTIONS.

09:30:42 11 13. INDIVIDUAL HELP DESCRIPTION PHRASES.

09:30:50 12 14. COMMAND PREFIXES THAT THE USER INTERFACE AUTO  
09:30:53 13 COMPLETES.

09:30:54 14 15. TAB COMPLETIONS.

09:30:57 15 IF CISCO PROVES VIRTUAL IDENTITY BETWEEN THE RELEVANT  
09:31:03 16 PROTECTED ELEMENTS, IT MUST ALSO PROVE THAT AN ORDINARY,  
09:31:07 17 REASONABLE OBSERVER WOULD FIND THE TOTAL CONCEPT AND FEEL OF  
09:31:11 18 ITS COPYRIGHTED WORKS AS A WHOLE TO BE VIRTUALLY IDENTICAL TO  
09:31:15 19 ARISTA'S CHALLENGED WORKS AS A WHOLE.

09:31:19 20 IN MAKING THAT COMPARISON, YOU SHOULD NOT CONSIDER  
09:31:22 21 ELEMENTS THAT ARE NOT ORIGINAL OR ARE NOT PROTECTABLE.

09:31:27 22 AS I PREVIOUSLY INSTRUCTED YOU, CISCO'S WORKS AS A WHOLE  
09:31:31 23 ARE ITS FOUR USER INTERFACES ASSOCIATED WITH ITS FOUR OPERATING  
09:31:37 24 SYSTEMS, AS WELL AS EACH OF CISCO'S ASSERTED TECHNICAL MANUALS.

09:31:44 25 ARISTA'S WORKS, AS A WHOLE, ARE THE USER INTERFACES FOR

09:31:47 1 EACH OF THE ACCUSED ARISTA OPERATING SYSTEMS AS WELL AS EACH OF  
09:31:52 2 ARISTA'S ACCUSED TECHNICAL MANUALS.

09:31:58 3 IF YOU CONCLUDE THAT CISCO HAS PROVEN, WHETHER BY DIRECT  
09:32:03 4 OR INDIRECT EVIDENCE, THAT ARISTA COPIED ORIGINAL, PROTECTED  
09:32:06 5 ELEMENTS OF CISCO'S WORKS, YOU MUST THEN DETERMINE WHETHER THAT  
09:32:12 6 COPYING WAS GREATER THAN DE MINIMUS, THAT IS MORE THAN A  
09:32:19 7 TRIVIAL AMOUNT OF CISCO'S WORKS AS A WHOLE.

09:32:22 8 IN MAKING THIS DETERMINATION, YOU SHOULD CONSIDER THE  
09:32:25 9 QUALITATIVE AS WELL AS THE QUANTITATIVE SIGNIFICANCE OF THE  
09:32:29 10 COPIED PORTION IN RELATION TO CISCO'S WORKS AS A WHOLE.

09:32:37 11 NOW I WILL EXPLAIN WHAT "FAIR USE" MEANS UNDER THE LAW.

09:32:42 12 FOR ARISTA'S FAIR USE DEFENSE.

09:32:45 13 ONE WHO IS NOT THE OWNER OF A COPYRIGHT MAY USE A  
09:32:49 14 COPYRIGHTED WORK IN A REASONABLE WAY UNDER THE CIRCUMSTANCES  
09:32:53 15 WITHOUT THE CONSENT OF THE COPYRIGHT OWNER IF IT WOULD ADVANCE  
09:32:57 16 THE PUBLIC INTEREST. SUCH USE OF A COPYRIGHTED WORK IS CALLED  
09:33:06 17 A FAIR USE.

09:33:07 18 THE OWNER OF A COPYRIGHT CANNOT PREVENT OTHERS FROM MAKING  
09:33:11 19 A FAIR USE OF THE OWNER'S COPYRIGHTED WORKS.

09:33:14 20 IN DETERMINING WHETHER THE USE MADE OF THE WORK WAS FAIR,  
09:33:18 21 YOU SHOULD CONSIDER THE FOLLOWING FACTORS.

- 09:33:21 22 1. THE PURPOSE AND CHARACTER OF THE USE.
- 09:33:25 23 2. THE NATURE OF THE COPYRIGHTED WORK.
- 09:33:28 24 3. THE AMOUNT AND SUBSTANTIALITY OF THE PORTION USED IN  
09:33:34 25 RELATION TO THE COPYRIGHTED WORK AS A WHOLE.

09:33:38 1 4. THE EFFECT OF THE USE UPON THE POTENTIAL MARKET FOR OR  
09:33:42 2 VALUE OF THE COPYRIGHTED WORK.

09:33:45 3 IF YOU FIND THAT ARISTA HAS PROVED BY A PREPONDERANCE OF  
09:33:48 4 THE EVIDENCE THAT IT MADE A FAIR USE OF CISCO'S WORK, YOUR  
09:33:51 5 VERDICT SHOULD BE FOR ARISTA.

09:34:01 6 THE FIRST STATUTORY FACTOR CONCERNS THE PURPOSE AND  
09:34:03 7 CHARACTER OF THE ACCUSED USE.

09:34:05 8 THIS FACTOR INCLUDES THREE ISSUES. WHETHER AND TO WHAT  
09:34:11 9 EXTENT THE ACCUSED USE SERVES A COMMERCIAL PURPOSE, WHICH  
09:34:15 10 WEIGHS AGAINST FAIR USE, VERSUS A NONPROFIT EDUCATIONAL  
09:34:19 11 PURPOSE, WHICH WEIGHS IN FAVOR OF FAIR USE;

09:34:23 12 AND TWO, WHETHER AND TO WHAT EXTENT THE ACCUSED WORK IS  
09:34:29 13 TRANSFORMATIVE, WHICH SUPPORTS FAIR USE.

09:34:32 14 A USE IS TRANSFORMATIVE IF IT ADDS SOMETHING NEW WITH A  
09:34:38 15 FURTHER PURPOSE OR DIFFERENT CHARGE, ALTERING THE FIRST USE  
09:34:42 16 WITH NEW EXPRESSION, MEANING, OR MESSAGE, RATHER THAN MERELY  
09:34:47 17 SUPERSEDING THE OBJECTS OF THE ORIGINAL CREATION.

09:34:52 18 NEW WORKS HAVE BEEN FOUND TRANSFORMATIVE WHEN THEY USE  
09:34:56 19 COPYRIGHTED MATERIAL FOR PURPOSES DISTINCT FROM THE PURPOSE OF  
09:35:00 20 THE ORIGINAL MATERIAL.

09:35:02 21 A USE IS CONSIDERED TRANSFORMATIVE ONLY WHEN THE DEFENDANT  
09:35:07 22 CHANGES THE PLAINTIFF'S COPYRIGHTED WORK OR USES COPYRIGHTED  
09:35:11 23 ELEMENTS FOR A DIFFERENT PURPOSE, SUCH AS THE ORIGINAL WORK IS  
09:35:16 24 TRANSFORMED INTO A NEW CREATION.

09:35:19 25 IN EVALUATING THE FIRST STATUTORY FACTOR, THE EXTENT OF

09:35:23 1 THE COMMERCIAL NATURE OF THE ACCUSED WORK MUST ALSO BE  
09:35:26 2 CONSIDERED. COMMERCIAL USE WEIGHS AGAINST A FINDING OF FAIR  
09:35:31 3 USE. HOWEVER, THE MORE TRANSFORMATIVE THE NEW WORK, THE LESS  
09:35:36 4 WILL BE THE SIGNIFICANCE OF OTHER FACTORS, LIKE COMMERCIALISM,  
09:35:41 5 THAT MAY WEIGH AGAINST A FINDING OF FAIR USE.

09:35:45 6 FINALLY, ALSO RELEVANT TO THE FIRST STATUTORY FACTOR IS  
09:35:50 7 THE PROPRIETY OF ARISTA'S CONDUCT.

09:35:56 8 THE SECOND STATUTORY FACTOR IS THE NATURE OF THE  
09:35:59 9 COPYRIGHTED WORK. THIS FACTOR CONSIDERS THE EXTENT TO WHICH  
09:36:03 10 THE WORK IS INFORMATIONAL OR CREATIVE. THIS FACTOR WEIGHS  
09:36:07 11 AGAINST FAIR USE IF THE WORK IS PURELY CREATIVE AND IT WEIGHS  
09:36:12 12 IN FAVOR OF FAIR USE IF THE WORK IS PURELY INFORMATIONAL OR  
09:36:16 13 FUNCTIONAL.

09:36:17 14 BUT LIKE ALL THINGS IN LIFE, MOST CASES FALL ON A SPECTRUM  
09:36:22 15 IN BETWEEN INFORMATIONAL AND CREATIVE. YOU MUST CONSIDER WHERE  
09:36:26 16 ON THIS SPECTRUM THE WORKS IN THIS CASE FALL.

09:36:33 17 THE THIRD STATUTORY FACTOR IS THE AMOUNT AND  
09:36:37 18 SUBSTANTIALITY OF THE PORTION USED IN RELATIONSHIP TO THE  
09:36:41 19 COPYRIGHTED WORK AS A WHOLE, WHICH CONCERNS HOW MUCH OF THE  
09:36:47 20 OVERALL COPYRIGHTED WORK WAS USED BY THE ACCUSED INFRINGER.

09:36:51 21 ANALYSIS OF THIS FACTOR IS VIEWED IN THE CONTEXT OF  
09:36:55 22 CISCO'S COPYRIGHTED WORKS, WHICH ARE THE FOUR USER INTERFACES  
09:37:00 23 OF IOS, IOS XR, IOS XE AND NX-OS. THE FACT, IF TRUE, THAT A  
09:37:09 24 SUBSTANTIAL PORTION OF AN INFRINGING WORK WAS COPIED VERBATIM,  
09:37:13 25 IS EVIDENCE OF THE QUALITATIVE VALUE OF THE COPIED MATERIAL,

09:37:17 1 BOTH TO THE ORIGINATOR AND TO WHOEVER SEEKS TO PROFIT FROM  
09:37:22 2 MARKETING SOMEONE ELSE'S COPYRIGHTED WORK.

09:37:26 3 WHOLESALE COPYING DOES NOT PRECLUDE FAIR USE PER SE, BUT  
09:37:30 4 IT MILITATES AGAINST A FINDING OF FAIR USE. EVEN A SMALL PART  
09:37:35 5 MAY BE QUALITATIVELY THE MOST IMPORTANT PART OF THE WORK.

09:37:40 6 IF, HOWEVER, THE SECONDARY USER ONLY COPIES AS MUCH AS IS  
09:37:45 7 NECESSARY FOR A TRANSFORMATIVE USE, THEN THIS FACTOR WILL NOT  
09:37:49 8 WEIGH AGAINST HIM OR HER. THE EXTENT OF PERMISSIBLE COPYING  
09:37:54 9 VARIES WITH THE PURPOSE AND CHARACTER OF THE USE, WHICH RELATES  
09:37:58 10 BACK TO THE FIRST FACTOR.

09:38:01 11 IN ASSESSING THIS THIRD FACTOR, BOTH THE QUANTITY OF THE  
09:38:08 12 MATERIAL USED OR THE QUALITY OR IMPORTANCE OF THE MATERIAL  
09:38:10 13 SHOULD BE CONSIDERED.

09:38:14 14 THE FOURTH STATUTORY FACTOR IS THE EFFECT OF THE ACCUSED  
09:38:19 15 INFRINGER'S USE ON THE POTENTIAL MARKET FOR OR VALUE OF THE  
09:38:23 16 COPYRIGHTED WORK. THIS FACTOR MILITATES AGAINST FAIR USE IF  
09:38:28 17 THE ACCUSED USE MATERIALLY IMPAIRS THE COPYRIGHTABILITY OR  
09:38:41 18 VALUE OF THE COPYRIGHTED WORK.

09:38:43 19 THIS IS THE MOST IMPORTANT FACTOR, BUT IT MUST BE WEIGHED  
09:38:45 20 WITH ALL THE OTHER FACTORS AND IS IT NOT NECESSARILY  
09:38:50 21 DISPOSITIVE.

09:38:51 22 THIS FACTOR CONSIDERS WHETHER THE ACCUSED WORK IS OFFERED  
09:38:53 23 OR USED AS A SUBSTITUTE FOR THE ORIGINAL COPYRIGHTED WORK.

09:38:58 24 THIS FACTOR CONSIDERS NOT ONLY THE EXTENT OF ANY MARKET  
09:39:01 25 HARM CAUSED BY THE ACCUSED INFRINGER'S ACTIONS BUT ALSO WHETHER

09:39:04 1 UNRESTRICTED AND WIDESPREAD USE OF THE COPYRIGHTED MATERIALS OF  
09:39:08 2 THE SORT ENGAGED IN BY THE ACCUSED INFRINGER WOULD RESULT IN A  
09:39:12 3 SUBSTANTIALLY ADVERSE IMPACT ON THE POTENTIAL MARKET FOR THE  
09:39:20 4 COPYRIGHTED WORK.

09:39:22 5 IF THE USE OF THE COPYRIGHTED MATERIALS IS TRANSFORMATIVE,  
09:39:27 6 MARKET SUBSTITUTION IS AT LEAST LESS CERTAIN, AND MARKET HARM  
09:39:32 7 MAY NOT BE PRESUMED.

09:39:37 8 YOU MUST CONSIDER EACH OF THE FACTORS I HAVE JUST  
09:39:39 9 IDENTIFIED TO DETERMINE WHETHER OR NOT ARISTA HAS CARRIED ITS  
09:39:43 10 BURDEN OF PROVING THAT ARISTA'S USE OF CISCO'S COPYRIGHTED WORK  
09:39:48 11 IS FAIR USE. NO ONE OF THESE FACTORS IS DETERMINATIVE OF THE  
09:39:55 12 ISSUE OF FAIR USE BY ITSELF. SOME FACTORS MAY WEIGH IN FAVOR  
09:39:59 13 OF FINDING FAIR USE AND SOME MAY WEIGH AGAINST A FINDING OF  
09:40:02 14 FAIR USE.

09:40:03 15 IN ADDITION, EACH FACTOR IS NOT ALWAYS ENTITLED TO EQUAL  
09:40:08 16 WEIGHT. THIS IS NOT A COUNTING EXERCISE WHERE THREE FACTORS IN  
09:40:13 17 FAVOR OF FAIR USE ALWAYS OUTWEIGH ONE FACTOR AGAINST FAIR USE.

09:40:19 18 MOREOVER, THESE ARE NOT THE ONLY FACTORS YOU MAY CONSIDER.  
09:40:23 19 IN DECIDING WHETHER TO CONSIDER ANY OTHER FACTORS BASED ON THE  
09:40:31 20 EVIDENCE AND CIRCUMSTANCES PRESENTED TO YOU IN THIS CASE, YOU  
09:40:33 21 SHOULD BE GUIDED BY THE POLICY UNDERLYING THE FAIR USE  
09:40:37 22 DOCTRINE, WHICH IS TO PERMIT LIMITED COPYING FROM COPYRIGHTED  
09:40:40 23 WORKS IN SPECIFIC CIRCUMSTANCES THAT AUTHORS REASONABLY EXPECT  
09:40:44 24 AND THAT ALLOW PRODUCTIVE USE OF WORK WITHOUT UNFAIRLY  
09:40:53 25 UNDERMINING THE PROTECTION AFFORDED BY COPYRIGHT LAW.



09:41:00 1 AFFIRMATIVE DEFENSE OF MERGER.

09:41:02 2 TO SHOW THAT CISCO'S COPYRIGHTED WORKS ARE SUBJECT TO  
09:41:06 3 MERGER, ARISTA MUST SHOW THAT AT THE TIME CISCO CREATED THE  
09:41:11 4 WORKS, CISCO HAD ONLY ONE WAY OR VERY FEW WAYS TO EXPRESS THE  
09:41:17 5 IDEAS UNDERLYING THE ELEMENTS OF CISCO'S COPYRIGHTED USER  
09:41:21 6 INTERFACES OR TECHNICAL MANUALS. MATERIAL IN AN ORIGINAL WORK,  
09:41:27 7 EVEN MATERIAL THAT SERVES A FUNCTION, IS NOT SUBJECT TO MERGER  
09:41:33 8 AS LONG AS THE AUTHOR HAD MORE THAN A FEW WAYS TO EXPRESS THE  
09:41:37 9 UNDERLYING IDEA.

09:41:38 10 ARISTA HAS THE BURDEN OF PROVING THIS DEFENSE BY A  
09:41:41 11 PREPONDERANCE OF THE EVIDENCE.

09:41:48 12 AFFIRMATIVE DEFENSE OF SCÈNES À FAIRE.

09:41:50 13 SCÈNES À FAIRE IS AN AFFIRMATIVE DEFENSE TO COPYRIGHT  
09:41:54 14 INFRINGEMENT.

09:41:56 15 TO SHOW THAT PORTIONS OF CISCO'S USER INTERFACES ARE  
09:42:00 16 SCÈNES À FAIRE MATERIAL, ARISTA MUST SHOW THAT AT THE TIME  
09:42:03 17 CISCO CREATED THE USER INTERFACES, NOT AT THE TIME OF ANY  
09:42:07 18 COPYING, EXTERNAL FACTORS OTHER THAN CISCO'S CREATIVITY  
09:42:13 19 DICTATED THAT CISCO SELECT, ARRANGE, ORGANIZE AND DESIGN ITS  
09:42:19 20 ORIGINAL FEATURES IN A MANNER IT DID.

09:42:21 21 THE SCÈNES À FAIRE DOCTRINE DEPENDS UPON THE CIRCUMSTANCES  
09:42:25 22 PRESENTED TO THE CREATOR AT THE TIME OF CREATION, NOT THE  
09:42:29 23 CIRCUMSTANCES PRESENTED TO THE COPIER AT THE TIME IT COPIED.

09:42:34 24 ARISTA HAS THE BURDEN OF PROVING THIS DEFENSE BY A  
09:42:37 25 PREPONDERANCE OF THE EVIDENCE.

09:42:40 1 AFFIRMATIVE DEFENSE OF COPYRIGHT MISUSE.

09:42:43 2 ARISTA CLAIMS IT IS NOT LIABLE FOR COPYRIGHT INFRINGEMENT  
09:42:48 3 BECAUSE CISCO MISUSED ITS COPYRIGHTS.

09:42:51 4 WHILE THE COPYRIGHT ACT GIVES A COPYRIGHT OWNER A LIMITED  
09:42:56 5 MONOPOLY IN A COPYRIGHTED WORK, THE OWNER'S ATTEMPTS TO EXTEND  
09:42:59 6 THE SCOPE OF THIS MONOPOLY MAY NOT, UNDER CERTAIN  
09:43:04 7 CIRCUMSTANCES, CONSTITUTE MISUSE.

09:43:07 8 I'M SORRY, LET ME REREAD THAT.

09:43:10 9 WHILE THE COPYRIGHT ACT GIVES A COPYRIGHT OWNER A LIMITED  
09:43:12 10 MONOPOLY IN A COPYRIGHTED WORK, THE OWNER'S ATTEMPT TO EXTEND  
09:43:17 11 THE SCOPE OF THIS MONOPOLY MAY, UNDER CERTAIN CIRCUMSTANCES,  
09:43:21 12 CONSTITUTE MISUSE.

09:43:23 13 IF YOU FIND THAT CISCO MISUSED ITS COPYRIGHTS, IT CANNOT  
09:43:27 14 ASSERT AN INFRINGEMENT CLAIM AGAINST ARISTA.

09:43:31 15 TO PREVAIL UPON ITS CLAIM THAT CISCO MISUSED ITS  
09:43:36 16 COPYRIGHTS, ARISTA MUST PROVE THAT CISCO ATTEMPTED TO USE THE  
09:43:41 17 EXISTENCE OF ITS COPYRIGHTS TO PREVENT ARISTA FROM USING  
09:43:46 18 UNPROTECTED ELEMENTS OF THE COPYRIGHTED WORK, OR TO PREVENT  
09:43:54 19 ARISTA FROM UNDER TAKING ACTIVITY SAVE GUARDED BY PUBLIC  
09:43:57 20 POLICY, SUCH AS THE POLICIES SUPPORTING FAIR USE.

09:44:00 21 ARISTA HAS THE BURDEN OF PROOF TO ESTABLISH CISCO'S  
09:44:02 22 COPYRIGHT MISUSE BY A PREPONDERANCE OF THE EVIDENCE.

09:44:08 23 AFFIRMATIVE DEFENSE OF ABANDONMENT.

09:44:11 24 ARISTA CONTENDS THAT A COPYRIGHT DOES NOT EXIST IN CISCO'S  
09:44:15 25 WORKS BECAUSE CISCO ABANDONED THE COPYRIGHTS. CISCO CANNOT

CLAIM OWNERSHIP OF THE COPYRIGHT IF IT WAS ABANDONED.

IN ORDER TO SHOW ABANDONMENT, ARISTA HAS THE BURDEN OF PROVING EACH OF THE FOLLOWING BY A PREPONDERANCE OF THE EVIDENCE:

1. CISCO INTENDED TO SURRENDER RIGHTS IN THE WORK.
2. AN ACT BY CISCO EVIDENCING THAT INTENT.

MERE INACTION DOES NOT CONSTITUTE ABANDONMENT OF THE COPYRIGHT. HOWEVER, THIS MAY BE A FACTOR FOR YOU TO CONSIDER IN DETERMINING WHETHER CISCO HAS ABANDONED THE COPYRIGHT.

IT IS THE DUTY OF THE COURT TO INSTRUCT YOU ABOUT THE MEASURE OF DAMAGES. BY INSTRUCTING YOU ON DAMAGES, THE COURT DOES NOT MEAN TO SUGGEST FOR WHICH PARTY YOUR VERDICT SHOULD BE RENDERED.

IF YOU FIND FOR CISCO ON ITS COPYRIGHT INFRINGEMENT CLAIM, YOU MUST DETERMINE CISCO'S DAMAGES.

CISCO IS ENTITLED TO RECOVER THE ACTUAL DAMAGES SUFFERED AS A RESULT OF THE INFRINGEMENT. IN ADDITION, CISCO IS ALSO ENTITLED TO RECOVER ANY OF ARISTA'S PROFITS ATTRIBUTABLE TO THE INFRINGEMENT, TO THE EXTENT YOU DID NOT ALREADY ACCOUNT FOR THOSE PROFITS IN DETERMINING CISCO'S ACTUAL DAMAGES.

CISCO MUST PROVE ITS DAMAGES BY A PREPONDERANCE OF THE EVIDENCE. IT IS FOR YOU TO DETERMINE WHAT DAMAGES, IF ANY, HAVE BEEN PROVED. YOUR AWARD MUST BE BASED UPON EVIDENCE AND NOT UPON SPECULATION, GUESSWORK OR CONJECTURE.

CISCO IS ENTITLED TO RECOVER THE ACTUAL DAMAGES SUFFERED

09:46:08 1 AS A RESULT OF ARISTA'S INFRINGEMENT. ACTUAL DAMAGES MEANS THE  
09:46:13 2 AMOUNT OF MONEY ADEQUATE TO COMPENSATE THE COPYRIGHT OWNER FOR  
09:46:17 3 THE REDUCTION IN THE FAIR MARKET VALUE OF THE COPYRIGHTED WORK  
09:46:23 4 CAUSED BY THE INFRINGEMENT.

09:46:25 5 ACTUAL DAMAGES MAY BE MEASURED BY THE PROFITS OF THE  
09:46:29 6 COPYRIGHT OWNER LOST DUE TO THE INFRINGEMENT REFERRED TO AS  
09:46:34 7 LOST PROFITS.

09:46:35 8 IN THIS CASE, ACTUAL DAMAGES IN THE FORM OF LOST PROFITS  
09:46:38 9 ARE THE AMOUNT THAT CISCO WOULD HAVE EARNED BUT FOR ARISTA'S  
09:46:42 10 INFRINGEMENT.

09:46:47 11 IN ADDITION TO ACTUAL DAMAGES, CISCO IS ENTITLED TO ANY  
09:46:51 12 PROFITS OF ARISTA'S ATTRIBUTABLE TO THE INFRINGEMENT. YOU MAY  
09:46:58 13 NOT INCLUDE IN AN AWARD OF PROFITS, ANY AMOUNT THAT YOU TOOK  
09:47:03 14 INTO ACCOUNT IN DETERMINING ACTUAL DAMAGES. YOU MAY MAKE AN  
09:47:08 15 AWARD OF ARISTA'S PROFITS ONLY IF YOU FIND THAT CISCO SHOWED A  
09:47:11 16 CAUSAL RELATIONSHIP BETWEEN THE PROFITS IT SEEKS AND THE  
09:47:17 17 COPYRIGHT INFRINGEMENT.

09:47:19 18 IN THIS CASE, BECAUSE CISCO SEEKS ONLY DIRECT PROFITS,  
09:47:24 19 CISCO MAY SATISFY ITS BURDEN BY SHOWING THAT THE PROFITS IT  
09:47:28 20 SEEKS TO RECOVER DERIVED DIRECTLY FROM THE SALES OF THE  
09:47:33 21 INFRINGING PRODUCTS.

09:47:35 22 ARISTA'S GROSS REVENUE IS ALL OF ARISTA'S REVENUE DIRECTLY  
09:47:39 23 FROM THE SALE OF ANY PRODUCTS CONTAINING OR USING CISCO'S  
09:47:44 24 COPYRIGHTED WORKS.

09:47:46 25 CISCO HAS THE BURDEN OF PROVING ARISTA'S GROSS REVENUE BY

09:47:49 1 A PREPONDERANCE OF THE EVIDENCE.

09:47:52 2 IF CISCO ESTABLISHES A CAUSAL RELATIONSHIP BETWEEN THE  
09:47:56 3 PROFITS IT SEEKS AND THE INFRINGEMENT, THE BURDEN SHIFTS TO  
09:48:00 4 ARISTA TO PROVE DEDUCTIBLE EXPENSES AND THE PORTION OF ITS  
09:48:04 5 PROFITS ATTRIBUTABLE TO FACTORS OTHER THAN INFRINGING THE  
09:48:08 6 COPYRIGHTED WORK.

09:48:10 7 DEDUCTIBLE EXPENSES ARE THE PORTION OF ARISTA'S OPERATING  
09:48:15 8 COSTS, OVER HEAD COSTS, AND PRODUCTION COSTS, INCURRED BY  
09:48:19 9 ARISTA IN PRODUCING ARISTA'S CROSS REVENUE FROM THE INFRINGING  
09:48:23 10 PRODUCTS.

09:48:24 11 ARISTA HAS THE BURDEN OF PROVING ITS EXPENSES BY A  
09:48:28 12 PREPONDERANCE OF THE EVIDENCE.

09:48:30 13 UNLESS YOU FIND THAT A PORTION OF THE PROFITS FROM THE  
09:48:34 14 SALE OF A PRODUCT CONTAINING OR USING CISCO'S COPYRIGHTED WORKS  
09:48:37 15 IS ATTRIBUTABLE TO FACTORS OTHER THAN THE COPYRIGHTED WORKS,  
09:48:43 16 ALL OF THE PROFIT IS TO BE ATTRIBUTED TO THE INFRINGEMENT.

09:48:47 17 ARISTA'S PROFITS DO NOT NEED TO BE CALCULATED WITH  
09:48:51 18 MATHEMATICAL OR ABSOLUTE EXACTNESS BY EITHER CISCO OR ARISTA.  
09:48:56 19 THE LAW REQUIRES ONLY A REASONABLE APPROXIMATION OF AN  
09:49:00 20 INFRINGER'S PROFITS AS A BASIS FOR DETERMINING THE PROPER  
09:49:04 21 AMOUNT OF DAMAGES.

09:49:13 22 I'M GOING TO MOVE ON TO THE PATENT CLAIM.

09:49:16 23 BEFORE YOU DECIDE WHETHER ARISTA HAS INFRINGED THE CLAIMS  
09:49:19 24 OF THE PATENT, YOU WILL NEED TO UNDERSTAND THE PATENT CLAIMS.  
09:49:24 25 THE PATENT CLAIMS ARE NUMBERED SENTENCES AT THE END OF THE

PATENT THAT DESCRIBE THE BOUNDARIES OF THE PATENT'S PROTECTION.

IT IS MY JOB AS JUDGE TO EXPLAIN TO YOU THE MEANING OF ANY LANGUAGE IN THE CLAIMS THAT NEEDS INTERPRETATION.

I HAVE INTERPRETED THE MEANING OF SOME OF THE LANGUAGE IN THE PATENT CLAIMS INVOLVED IN THIS CASE. YOU MUST ACCEPT THOSE INTERPRETATIONS AS CORRECT.

THESE INTERPRETATIONS WERE HANDED TO YOU AT THE START OF THE TRIAL. FOR ANY CLAIM TERM FOR WHICH I HAVE NOT PROVIDED YOU A DEFINITION, YOU SHOULD APPLY THE PLAIN AND ORDINARY MEANING OF THAT AS UNDERSTOOD BY ONE OF ORDINARY SKILL IN THE ART.

MY INTERPRETATION OF THE LANGUAGE SHOULD NOT BE TAKEN AS AN INDICATION THAT I HAVE A VIEW REGARDING THE ISSUE OF INFRINGEMENT. THE DECISION REGARDING INFRINGEMENT IS YOURS TO MAKE.

I HAVE MADE THE FOLLOWING CLAIM INTERPRETATIONS OF TERMS FOUND IN THE ASSERTED CLAIMS.

FOR THE PHRASE "MANAGEMENT PROGRAMS" IN THE '526 PATENT CLAIMS, I INSTRUCT YOU TO INTERPRET THAT TO MEAN THE FOLLOWING:

"TOOLS OR AGENTS CONFIGURED TO EXECUTE USER-DIRECTED COMMANDS HAVING THEIR OWN RESPECTIVE COMMAND FORMATS THAT PROVIDE MANAGEMENT FUNCTIONS."

FOR THE PHRASE "GENERIC COMMAND" IN THE '526 PATENT CLAIMS, I INSTRUCT YOU TO INTERPRET THAT TO MEAN THE FOLLOWING:

"COMMAND THAT PROVIDES AN ABSTRACTION OF THE TOOL-SPECIFIC

09:51:07 1 COMMAND FORMATS AND SYNTAX, ENABLING A USER TO ISSUE THE  
09:51:11 2 COMMAND BASED ON THE RELATIVE FUNCTIONS AS OPPOSED TO THE  
09:51:14 3 SPECIFIC SYNTAX FOR A CORRESPONDING TOOL."

09:51:19 4 FOR THE PHRASE "COMMAND PARSE TREE" IN THE '526 PATENT  
09:51:24 5 CLAIMS, I INSTRUCT YOU TO INTERPRET THAT TO MEAN THE FOLLOWING.  
09:51:29 6 "A HIERARCHICAL DATA STRUCTURE."

09:51:32 7 THE FOLLOWING PHRASE APPEARS IN CERTAIN CLAIMS OF THE '526  
09:51:41 8 PATENT. "THE COMMAND PARSE TREE HAVING ELEMENTS EACH  
09:51:43 9 SPECIFYING AT LEAST ONE CORRESPONDING GENERIC COMMAND COMPONENT  
09:51:47 10 AND A CORRESPONDING AT LEAST ONE COMMAND ACTION VALUE."

09:51:52 11 WITHIN THAT PHRASE, FOR THE TERM "COMMAND ACTION VALUE," I  
09:51:56 12 INSTRUCT YOU TO INTERPRET THAT TO MEAN, "A VALUE THAT  
09:51:58 13 IDENTIFIES A PRESCRIBED COMMAND."

09:52:06 14 FOR THE LARGER PHRASE, I INSTRUCT YOU TO INTERPRET IT TO  
09:52:09 15 MEAN "THE COMMAND PARSE TREE, HAVING ELEMENTS SUCH THAT EACH  
09:52:13 16 ELEMENT SPECIFIES AT LEAST ONE COMMAND ACTION VALUE FOR EACH  
09:52:19 17 GENERIC COMMAND COMPONENT."

09:52:25 18 I WILL NOW INSTRUCT YOU ON THE RULES YOU MUST FOLLOW IN  
09:52:27 19 DECIDING WHETHER CISCO HAS PROVEN THAT ARISTA HAS INFRINGED ONE  
09:52:30 20 OR MORE OF THE ASSERTED CLAIMS OF THE '526 PATENT.

09:52:35 21 TO PROVE INFRINGEMENT OF ANY CLAIM, CISCO MUST PERSUADE  
09:52:38 22 YOU THAT IT IS MORE LIKELY THAN NOT THAT ARISTA HAS INFRINGED  
09:52:48 23 THAT CLAIM.

09:52:50 24 A PATENT'S CLAIMS DEFINE WHAT IS COVERED BY THE PATENT. A  
09:52:52 25 PRODUCT OR METHOD DIRECTLY INFRINGES A PATENT IF IT IS COVERED

09:52:56 1 BY AT LEAST ONE CLAIM OF THE PATENT.

09:52:59 2 DECIDING WHETHER A CLAIM HAS BEEN DIRECTLY INFRINGED IS A  
09:53:02 3 TWO-STEP PROCESS. THE FIRST STEP IS TO DECIDE THE MEANING OF  
09:53:06 4 THE PATENT CLAIM. I HAVE ALREADY MADE THIS DECISION AND I HAVE  
09:53:11 5 ALREADY INSTRUCTED YOU AS TO THE MEANING OF THE ASSERTED PATENT  
09:53:15 6 CLAIMS.

09:53:16 7 THE SECOND STEP IS TO DECIDE WHETHER ARISTA HAS MADE,  
09:53:21 8 USED, SOLD, OFFERED FOR SALE, OR IMPORTED WITHIN THE UNITED  
09:53:25 9 STATES, A PRODUCT OR SERVICE COVERED BY A CLAIM OF THE '526  
09:53:29 10 PATENT. IF IT HAS, IT INFRINGES. YOU, THE JURY, MAKE THIS  
09:53:33 11 DECISION.

09:53:36 12 YOU MUST DECIDE EACH OF THE ASSERTED CLAIMS OF THE PATENT  
09:53:39 13 INDIVIDUALLY, AND DECIDE WHETHER ARISTA'S PRODUCTS OR SERVICES  
09:53:43 14 INFRINGE THAT CLAIM. YOU HAVE HEARD EVIDENCE ABOUT BOTH  
09:53:47 15 CISCO'S COMMERCIAL PRODUCTS AND ARISTA'S ACCUSED PRODUCTS AND  
09:53:50 16 SERVICES. HOWEVER, IN DECIDING THE ISSUE OF INFRINGEMENT, YOU  
09:53:54 17 MAY NOT COMPARE ARISTA'S ACCUSED PRODUCTS AND SERVICES TO  
09:53:58 18 CISCO'S COMMERCIAL PRODUCTS.

09:54:01 19 RATHER, YOU MUST COMPARE ARISTA'S ACCUSED PRODUCTS AND  
09:54:05 20 SERVICES TO THE CLAIMS OF THE '526 PATENT WHEN MAKING YOUR  
09:54:10 21 DECISION REGARDING INFRINGEMENT.

09:54:11 22 WHETHER OR NOT ARISTA KNEW ITS PRODUCTS OR SERVICES  
09:54:14 23 INFRINGED OR EVEN KNEW OF THE PATENT DOES NOT MATTER IN  
09:54:17 24 DETERMINING DIRECT INFRINGEMENT.

09:54:24 25 TO DECIDE WHETHER ARISTA'S PRODUCTS AND SERVICES LITERALLY



09:54:27 1 INFRINGE A CLAIM OF THE '526 PATENT, YOU MUST COMPARE THAT  
09:54:33 2 PRODUCT OR SERVICES WITH THE PATENT CLAIM AND DETERMINE WHETHER  
09:54:37 3 EVERY REQUIREMENT OF THE CLAIM IS INCLUDED IN THAT PRODUCT OR  
09:54:41 4 SERVICE.

09:54:42 5 IF SO, ARISTA'S PRODUCT OR SERVICE LITERALLY INFRINGES  
09:54:47 6 THAT CLAIM. IF HOWEVER, ARISTA'S PRODUCT OR SERVICE DOES NOT  
09:54:51 7 HAVE EVERY REQUIREMENT OF THE PATENT CLAIM, ARISTA'S PRODUCT OR  
09:54:56 8 SERVICE DOES NOT LITERALLY INFRINGE THAT CLAIM.

09:55:00 9 YOU MUST DECIDE LITERAL INFRINGEMENT FOR EACH ASSERTED  
09:55:03 10 CLAIM SEPARATELY.

09:55:05 11 IF THE PATENT CLAIM USES THE TERM COMPRISING, THAT PATENT  
09:55:11 12 CLAIM IS TO BE UNDERSTOOD AS AN "OPEN CLAIM." AN OPEN CLAIM IS  
09:55:17 13 INFRINGED AS LONG AS EVERY REQUIREMENT IN THE CLAIM IS PRESENT  
09:55:20 14 IN ARISTA'S PRODUCT OR SERVICE.

09:55:22 15 THE FACT THAT ARISTA'S PRODUCT OR SERVICE ALSO INCLUDES  
09:55:26 16 OTHER PARTS OR STEPS, WILL NOT AVOID INFRINGEMENT. AS LONG AS  
09:55:31 17 IT HAS EVERY REQUIREMENT OF THE PATENT CLAIM.

09:55:38 18 CISCO ALSO CONTENDS THAT ARISTA HAS CONTRIBUTED TO  
09:55:43 19 INFRINGEMENT BY ANOTHER. CONTRIBUTORY INFRINGEMENT MAY ARISE  
09:55:50 20 WHEN SOMEONE SUPPLIES SOMETHING THAT IS USED TO INFRINGE ONE OR  
09:55:53 21 MORE OF THE PATENT CLAIMS. CONTRIBUTORY INFRINGEMENT IS A FORM  
09:55:57 22 OF INDIRECT INFRINGEMENT.

09:56:01 23 IN ORDER FOR THERE TO BE CONTRIBUTORY INFRINGEMENT BY  
09:56:04 24 ARISTA, SOMEONE OTHER THAN ARISTA MUST DIRECTLY INFRINGE A  
09:56:07 25 CLAIM OF THE '526 PATENT. IF THERE IS NO DIRECT INFRINGEMENT

09:56:11 1 BY ANYONE, THERE CAN BE NO CONTRIBUTORY INFRINGEMENT.

09:56:16 2 IF YOU FIND SOMEONE HAS DIRECTLY INFRINGED THE '526  
09:56:19 3 PATENT, THEN CONTRIBUTORY INFRINGEMENT EXISTS IF:

09:56:22 4 1. ARISTA SUPPLIED AN IMPORTANT COMPONENT OF THE  
09:56:31 5 INFRINGING PART OF THE PRODUCT OR SERVICE.

09:56:33 6 2. THE COMPONENT IS NOT A COMMON COMPONENT SUITABLE FOR  
09:56:39 7 NONINFRINGEMENT USE.

09:56:40 8 3. ARISTA SUPPLIED THE COMPONENT WITH THE KNOWLEDGE OF  
09:56:44 9 THE '526 PATENT AND KNOWLEDGE THAT THE COMPONENT WAS ESPECIALLY  
09:56:48 10 MADE OR ADAPTED FOR USE IN AN INFRINGING MANNER.

09:56:53 11 A COMMON COMPONENT SUITABLE FOR NONINFRINGEMENT USE IS A  
09:56:57 12 COMPONENT THAT HAS USES OTHER THAN AS A COMPONENT OF THE  
09:57:07 13 PATENTED PRODUCT OR OTHER THAN IN THE PATENTED METHOD, AND  
09:57:09 14 THOSE OTHER USES WERE NOT OCCASIONAL, FAR-FETCHED, IMPRACTICAL  
09:57:14 15 EXPERIMENTAL OR HYPOTHETICAL.

09:57:17 16 CISCO ARGUES THAT ARISTA HAS ACTIVELY INDUCED ANOTHER TO  
09:57:20 17 INFRINGE THE '526 PATENT. IN ORDER FOR ARISTA TO HAVE INDUCED  
09:57:24 18 INFRINGEMENT, ARISTA MUST HAVE INDUCED ANOTHER TO DIRECTLY  
09:57:28 19 INFRINGE A CLAIM OF THE '526 PATENT.

09:57:33 20 IF THERE IS NO DIRECT INFRINGEMENT BY ANYONE, THERE CAN BE  
09:57:37 21 NO INDUCED INFRINGEMENT. INDUCED INFRINGEMENT IS A FORM OF  
09:57:40 22 INDIRECT INFRINGEMENT.

09:57:41 23 IN ORDER TO BE LIABLE FOR INDUCING INFRINGEMENT, ARISTA  
09:57:45 24 MUST HAVE:

09:57:45 25 1. INTENTIONALLY TAKEN ACTION THAT ACTUALLY INDUCED

09:57:49 1 DIRECT INFRINGEMENT.

09:57:50 2 2. BEEN AWARE OF THE '526 PATENT.

09:57:53 3 3. KNOWN THAT THE ACTS IT WAS CAUSING WOULD INFRINGE THE  
09:57:57 4 PATENT.

09:57:58 5 ARISTA MAY BE CONSIDERED TO HAVE KNOWN THAT THE ACTS IT  
09:58:02 6 WAS CAUSING WOULD INFRINGE THE '526 PATENT IF IT SUBJECTIVELY  
09:58:06 7 BELIEVED THERE WAS A HIGH PROBABILITY THAT THE DIRECT  
09:58:09 8 INFRINGER'S PRODUCT OR METHOD WAS PATENTED AND, NEVERTHELESS,  
09:58:13 9 DELIBERATELY TOOK STEPS TO AVOID LEARNING THAT FACT.

09:58:16 10 IN OTHER WORDS, WILLFULLY BLINDED ITSELF TO THE INFRINGING  
09:58:19 11 NATURE OF THE DIRECT INFRINGER'S ACTS.

09:58:34 12 IN THIS CASE CISCO ARGUES THAT ARISTA WILLFULLY INFRINGED  
09:58:37 13 THE '526 PATENT BY SELLING EOS PLUS. AFTER CISCO FILED ITS  
09:58:42 14 COMPLAINT TO PROVE WILLFUL INFRINGEMENT AGAINST ARISTA, CISCO  
09:58:47 15 MUST FIRST PERSUADE YOU THAT ARISTA INFRINGED A CLAIM OF  
09:58:51 16 CISCO'S PATENT. THE REQUIREMENTS FOR PROVING SUCH INFRINGEMENT  
09:58:55 17 WERE DISCUSSED IN MY PRIOR INSTRUCTIONS.

09:58:57 18 TO PROVE WILLFUL INFRINGEMENT OF A PATENT, CISCO MUST  
09:59:01 19 PERSUADE YOU BY A PREPONDERANCE OF THE EVIDENCE THAT ARISTA HAD  
09:59:07 20 KNOWLEDGE OF THE PATENT AT ISSUE AND ACTED IN BAD FAITH,  
09:59:11 21 WANTONLY, MALICIOUSLY, DELIBERATELY, CONSCIOUSLY, WRONGFULLY,  
09:59:16 22 FLAGRANTLY, OR WITH RECKLESS DISREGARD OF ANY OF THE ASSERTED  
09:59:20 23 CLAIMS OF ANY OF THE '526 PATENT.

09:59:24 24 YOU MUST BASE YOUR VERDICT ON THE KNOWLEDGE AND ACTIONS OF  
09:59:28 25 ARISTA AT THE TIME THE INFRINGEMENT HAPPENED.

09:59:33 1 INFRINGEMENT ALONE, IS NOT ENOUGH TO PROVE WILLFULNESS,  
09:59:35 2 AND MERE KNOWLEDGE OF THE '526 PATENT AT THE TIME OF  
09:59:39 3 INFRINGEMENT IS NOT ENOUGH TO PROVE WILFULNESS.

09:59:42 4 ADDITIONALLY, TO PROVE THAT THE SALE OF EOS+ IS AN ACT OF  
09:59:47 5 WILLFUL INFRINGEMENT, CISCO MUST PERSUADE YOU THAT EOS+ IS A  
09:59:52 6 NEW PRODUCT COMPARED TO EOS.

09:59:55 7 YOU SHOULD CONSIDER ALL THE CIRCUMSTANCES INCLUDING THE  
09:59:58 8 MOTIVE OR INTENT OF ARISTA IN DEVELOPING AND SELLING THE  
10:00:01 9 ACCUSED PRODUCTS, WHETHER ARISTA KNEW OR SHOULD HAVE KNOWN THAT  
10:00:05 10 ITS CONDUCT WAS UNREASONABLY RISKY AND WHETHER ARISTA HAD A  
10:00:11 11 REASONABLE BELIEF AT THE TIME OF THE ALLEGED INFRINGEMENT THAT  
10:00:13 12 ITS PRODUCTS DID NOT INFRINGE ANY OF THE ASSERTED CLAIMS OF THE  
10:00:18 13 '526 PATENT.

10:00:25 14 I WILL INSTRUCT YOU ABOUT THE MEASURE OF DAMAGES FOR  
10:00:27 15 CISCO'S PATENT CLAIM. BY INSTRUCTING YOU ON DAMAGES, I AM NOT  
10:00:32 16 SUGGESTING WHICH PARTY SHOULD WIN ON ANY ISSUE.

10:00:36 17 IF YOU FIND THAT ARISTA INFRINGED ANY CLAIM OF THE '526  
10:00:41 18 PATENT, YOU MUST THEN DETERMINE THE AMOUNT OF MONEY DAMAGES TO  
10:00:44 19 BE AWARDED TO CISCO TO COMPENSATE IT FOR INFRINGEMENT.

10:00:49 20 THE AMOUNT OF THOSE DAMAGES MUST BE ADEQUATE TO COMPENSATE  
10:00:53 21 CISCO FOR THE INFRINGEMENT. A DAMAGES AWARD SHOULD PUT THE  
10:00:58 22 PATENT HOLDER IN APPROXIMATELY THE FINANCIAL POSITION IT WOULD  
10:01:01 23 HAVE BEEN IN HAD THE INFRINGEMENT NOT OCCURRED. BUT IN NO  
10:01:06 24 EVENT MAY THE DAMAGES AWARD BE LESS THAN A REASONABLE ROYALTY.

10:01:10 25 YOU SHOULD KEEP IN MIND THAT THE DAMAGES YOU AWARD ARE

10:01:13 1 MEANT TO COMPENSATE CISCO AND NOT PUNISH ARISTA.

10:01:18 2 CISCO HAS THE BURDEN TO PERSUADE YOU OF THE AMOUNT OF ITS  
10:01:21 3 DAMAGES. YOU SHOULD AWARD ONLY THOSE DAMAGES THAT CISCO MORE  
10:01:25 4 LIKELY THAN NOT SUFFERED. WHILE CISCO IS NOT REQUIRED TO PROVE  
10:01:29 5 ITS DAMAGES WITH MATHEMATICAL PRECISION, IT MUST PROVE THEM  
10:01:35 6 WITH REASONABLE CERTAINTY. CISCO IS NOT ENTITLED TO DAMAGES  
10:01:38 7 THAT ARE REMOTE OR SPECULATIVE.

10:01:49 8 A ROYALTY IS A PAYMENT MADE TO A PATENT HOLDER IN EXCHANGE  
10:01:53 9 FOR THE RIGHT TO MAKE, USE, OR SELL THE CLAIMED INVENTION.  
10:01:56 10 THIS RIGHT IS CALLED A LICENSE. A REASONABLE ROYALTY IS THE  
10:02:00 11 PAYMENT FOR THE LICENSE THAT WOULD HAVE RESULTED FROM A  
10:02:03 12 HYPOTHETICAL NEGOTIATION BETWEEN THE PATENT HOLDER AND THE  
10:02:07 13 INFRINGER TAKING PLACE AT THE TIME WHEN THE INFRINGING ACTIVITY  
10:02:12 14 FIRST BEGAN.

10:02:13 15 IN CONSIDERING THE NATURE OF THIS NEGOTIATION, YOU MUST  
10:02:17 16 ASSUME THAT THE PATENT HOLDER AND THE INFRINGER WOULD HAVE  
10:02:21 17 ACTED REASONABLY AND WOULD HAVE ENTERED INTO A LICENSE  
10:02:24 18 AGREEMENT.

10:02:25 19 YOU MUST ALSO ASSUME THAT BOTH PARTIES BELIEVE THE PATENT  
10:02:29 20 WAS VALID AND INFRINGED. YOUR ROLE IS TO DETERMINE WHAT THE  
10:02:34 21 RESULT OF THAT NEGOTIATION WOULD HAVE BEEN.

10:02:38 22 THE TEST FOR DAMAGES IS WHAT ROYALTY WOULD HAVE RESULTED  
10:02:42 23 FROM THE HYPOTHETICAL NEGOTIATION, NOT SIMPLY WHAT EITHER PARTY  
10:02:47 24 WOULD HAVE PREFERRED.

10:02:49 25 ONE WAY TO CALCULATE A ROYALTY IS TO DETERMINE A ONE-TIME

1 LUMP SUM PAYMENT THAT THE INFRINGER WOULD HAVE PAID AT THE TIME  
2 OF A HYPOTHETICAL NEGOTIATION FOR A LICENSE COVERING ALL THE  
3 SALES OF THE LICENSED PRODUCT FOR SOME PERIOD OF TIME.

4 THAT PERIOD OF TIME MAY INCLUDE BOTH PAST AND FUTURE  
5 SALES.

6 WHEN A ONE-TIME LUMP SUM IS PAID, THE INFRINGER PAYS A  
7 SINGLE PRICE FOR A LICENSE COVERING BOTH PAST AND FUTURE  
8 INFRINGING SALES.

9 DAMAGES THAT CISCO MAY BE AWARDED BY YOU COMMENCE ON THE  
10 DATE THAT ARISTA HAS BOTH INFRINGED AND BEEN NOTIFIED OF THE  
11 '526 PATENT. IN THIS CASE, CISCO AND ARISTA AGREE THAT DATE  
12 WAS DECEMBER 5, 2014.

13 THE COURT: ALL RIGHT. THAT'S WHERE I'M GOING TO  
14 STOP.

15 THE REMAINDER OF THE INSTRUCTIONS HAVE TO DO WITH WHAT YOU  
16 DO IN THE JURY ROOM. IT TOOK JUST ABOUT THE TIME I THOUGHT IT  
17 WOULD, AND I THINK WE COULD ALL PROBABLY USE A BREAK, AND  
18 THERE'S A LITTLE BIT OF SET UP AS WELL.

19 SO LET'S TAKE A 10-MINUTE BREAK.

20 (RECESS FROM 10:04 A.M. UNTIL 10:14 A.M.)

21 THE COURT: WE ARE BACK ON THE RECORD AND ALL OF OUR  
22 JURORS ARE HERE.

23 ALL RIGHT. NOW I GET TO TURN THE MATTER OVER TO THE  
24 ATTORNEYS.

25 MR. NELSON, WOULD YOU LIKE TO GIVE YOUR CLOSING ARGUMENT?

10:14:30 1 MR. NELSON: YES. THANK YOU, YOUR HONOR.

10:14:32 2 THE COURT: GO AHEAD, PLEASE.

10:14:33 3 **CLOSING ARGUMENTS BY MR. NELSON**

10:14:41 4 ALL RIGHT. GOOD MORNING, EVERYBODY. SO I KNOW IT'S BEEN  
10:14:45 5 A LONG TIME. I DO. I UNDERSTAND THAT. AND IT'S A LOT TO TAKE  
10:14:50 6 IN, AND I REALLY DO APPRECIATE IT. AS I STARTED OUT TELLING  
10:14:54 7 YOU, I KNOW IT'S A LOT -- IT'S A LOT TO LISTEN TO.

10:14:58 8 AND YOU KNOW, IT'S PARTICULARLY TOUGH TO TAKE IN WHEN YOU  
10:15:01 9 HAVEN'T REALLY BEEN INSTRUCTED ON THE LAW YET. I MEAN, YOU  
10:15:04 10 JUST HEARD THAT, YOUR HONOR READ YOU THOSE INSTRUCTIONS AND YOU  
10:15:08 11 ARE GOING TO HAVE THOSE BACK IN THE JURY ROOM, AND THAT'S  
10:15:10 12 IMPORTANT.

10:15:10 13 SO REALLY, WHAT I WANT TO DO, THIS IS MY OPPORTUNITY, AS  
10:15:13 14 HER HONOR SAID, FOR ME TO KIND OF WALK YOU THROUGH, I SAT  
10:15:16 15 THROUGH THIS CASE TOO, YOU KNOW, I HAVE BEEN HERE THE WHOLE  
10:15:19 16 TIME, HOW I SAW THE EVIDENCE.

10:15:21 17 AND WHEN I SAY I, I MEAN WE, MR. PAK, OBVIOUSLY, OUR SIDE,  
10:15:26 18 I JUST DON'T LIKE TO REFER TO MYSELF AS "WE" WHEN WE ARE  
10:15:29 19 TALKING.

10:15:30 20 AND ALSO IN THE CONTEXT OF THAT LAW, I THINK THAT'S  
10:15:33 21 IMPORTANT AND I'M GOING TO TRY TO WALK YOU THROUGH SOME OF  
10:15:35 22 THAT.

10:15:35 23 SO IT IS PROBABLY NOT A SURPRISE THAT I HAVE A  
10:15:39 24 PRESENTATION. AND IN HERE YOU WILL SEE A NUMBER OF TIMES THAT  
10:15:41 25 I EXHIBIT NUMBERS BLOWN UP. AND IF YOU WANT TO WRITE THOSE

10:15:46 1 DOWN, PLEASE DO. I WILL CALL SOME OF THOSE OUT, BUT THOSE ARE  
10:15:49 2 THINGS THAT I THINK ARE PARTICULARLY IMPORTANT FOR YOU TO GO  
10:15:52 3 BACK AND LOOK AT AS YOU ARE TRYING TO EVALUATE THE EVIDENCE IN  
10:15:54 4 THE CONTEXT OF THE LAW THAT HER HONOR JUST READ.

10:15:58 5 SO WITH THAT, LET ME GET GOING HERE.

10:16:01 6 THERE'S BEEN A LOT OF TALK ABOUT THIS CASE ABOUT WHAT THE  
10:16:03 7 MOTIVATION WAS, WHAT WAS CISCO'S MOTIVATION FOR BRINGING THIS  
10:16:07 8 CASE. AND WE'VE HEARD A LOT OF THAT. BUT WE KNOW WHAT IT IS.  
10:16:12 9 ARISTA IS THE BLATANT VIOLATOR HERE.

10:16:15 10 AND DR. BLACK, YOU WILL RECALL, I TALKED IT HIM ABOUT THIS  
10:16:20 11 ON THE STAND, SAID THAT MAKES SENSE, RIGHT? THAT MAKES SENSE.  
10:16:23 12 YOU CAN'T GO AFTER EVERYBODY OUT THERE. IT'S TOO EXPENSIVE,  
10:16:27 13 IT'S TOO HARD, IT'S TOO DISTRACTING. SO YOU PICK THE BLATANT  
10:16:33 14 VIOLATOR, AND THAT'S ARISTA IN THIS CASE, AND THAT MAKES SENSE.

10:16:37 15 SO HOW DO WE KNOW THAT? SOME OF THESE THINGS YOU WILL SEE  
10:16:41 16 HERE, EXHIBIT 168, WE TALKED ABOUT THIS IN OPENING, AND I  
10:16:44 17 BELIEVE I DID TALK ABOUT THIS DOCUMENT. NOW ARISTA ITSELF,  
10:16:48 18 THIS IS FROM 2014, JULY OF 2014, THEY'RE OUT THERE TELLING  
10:16:54 19 PEOPLE, RIGHT, TELLING THEIR SALES ENGINEERS THAT WE HAVE "BY  
10:16:59 20 FAR THE MOST SIMILAR." IN OTHER WORDS, WE TOOK THE MOST.  
10:17:03 21 WE'RE CISCO, RIGHT, WE ARE THE MOST BLATANT VIOLATOR.

10:17:09 22 AND THAT WASN'T AN ACCIDENT THAT THAT HAPPENED, RIGHT? WE  
10:17:14 23 HEARD FROM MR. SADANA, MR. SADANA WAS UP ON THE STAND TWICE, HE  
10:17:18 24 IS THE CHIEF CUSTOMER OFFICER AT ARISTA, YOU WILL RECALL.

10:17:22 25 AND WHAT DID HE SAY? THESE ARE IN RESPONSE TO SOME



10:17:25 1 QUESTIONS THAT I ASKED HIM. "IT'S TRUE THAT WE USED THE SAME  
10:17:30 2 CLI FOR MANY OF OUR BASE OR CORE FEATURES."

10:17:33 3 "AND INTENTIONALLY COPIED THAT, RIGHT?"

10:17:36 4 "FOR THOSE CORE FEATURES, YES."

10:17:38 5 THAT'S IMPORTANT, AND YOU ARE GOING TO SEE THIS THEME  
10:17:41 6 THROUGHOUT AS WE TALK ABOUT THIS, BECAUSE YOU KNOW, ARISTA SAYS  
10:17:44 7 I DIDN'T TAKE A LOT. I DIDN'T TAKE A LOT OF THIS.

10:17:49 8 BUT THE BOTTOM LINE IS THEY TOOK WHAT THEY NEEDED TO TAKE.  
10:17:52 9 WE HEARD EVIDENCE FROM SOME OF THE THIRD PARTIES ABOUT WHAT THE  
10:17:56 10 CORE FEATURES ARE IN THE SWITCHES, WHAT PEOPLE EXPECT TO SEE.  
10:17:58 11 AND THAT'S WHAT THEY TOOK. THAT'S WHAT THEY TOOK SO THEY COULD  
10:18:01 12 GO OUT THERE AND THEY COULD TELL THE CUSTOMER, YOU DON'T NEED  
10:18:06 13 TO RETRAIN, YOU KNOW CISCO, YOU KNOW US. YOU CAN DROP US IN,  
10:18:09 14 AND WE CAN REPLACE CISCO. AND THAT'S WHY WE'RE HERE.

10:18:12 15 AND WHAT ELSE DO WE KNOW ABOUT ARISTA BEING A BLATANT  
10:18:17 16 VIOLATOR? WE KNOW FROM DR. BLACK'S OWN STUDY, AND WE'VE TALKED  
10:18:22 17 ABOUT THIS AND THERE ARE SOME ISSUES WITH RESPECT TO THAT.  
10:18:25 18 THIS IS EXHIBIT 9041, I PUT THIS ONE INTO EVIDENCE, AS YOU WILL  
10:18:29 19 RECALL.

10:18:30 20 WE KNOW THAT A MAJORITY OF THESE COMMANDS THAT ARE AT  
10:18:34 21 ISSUE HERE IN THIS CASE FROM THIS COLLECTION WEREN'T USED BY  
10:18:37 22 THE VAST MAJORITY. I MEAN, 51 ARE USED BY NOBODY BUT ARISTA  
10:18:42 23 AND CISCO. ANOTHER 43 ARE USED BY ONLY ONE OTHER VENDOR. AND  
10:18:46 24 REMEMBER THERE WERE 18, THOSE WERE HAND-PICKED BY DR. BLACK,  
10:18:50 25 HAND-PICKED BY DR. BLACK IN ORDER TO PROVE A POINT. HE SAID,

10:18:53 1 IN ORDER TO SHOW WIDESPREAD.

10:18:55 2 HE DIDN'T INCLUDE THE PEOPLE WHO HE DIDN'T BELIEVE HAD  
10:18:59 3 COMMAND OVERLAP. SO THIS WASN'T AN EFFORT TO GO OUT AND SAY,  
10:19:02 4 LET'S SURVEY THE MARKET AND LET'S SEE WHAT PEOPLE ARE DOING OUT  
10:19:05 5 THERE. THIS IS KNOWN. LET ME PICK THE ONES WHERE I THINK  
10:19:09 6 THERE ARE SOME OVERLAP.

10:19:10 7 ANOTHER 43, WHERE 17 OF HIS HAND-PICKED GROUP WEREN'T  
10:19:14 8 USING IT. ANOTHER 52, WHERE ANOTHER -- WHERE 16 OF HIS  
10:19:20 9 HAND-PICKED GROUP WEREN'T USING. ARISTA IS THE BLATANT  
10:19:23 10 VIOLATOR HERE.

10:19:25 11 SO THE FIRST THING I WANT TO TALK TO YOU ABOUT, AND THESE  
10:19:29 12 ARE KIND OF BROKEN DOWN INTO WHAT I SEE AS THE MAJOR ISSUES IN  
10:19:33 13 THE CASE.

10:19:34 14 LET'S TALK ABOUT THE ORIGINALITY AND THE CREATIVITY OF  
10:19:37 15 THIS USER INTERFACE.

10:19:38 16 NOW WE HEARD FROM MR. LOUGHEED, YOU WILL RECALL THIS  
10:19:41 17 PICTURE, I THINK HE SAID THIS WAS BACK WHEN HE HAD MORE HAIR,  
10:19:45 18 BACK AT THE TIME WHEN THESE PRODUCTS WEREN'T OUT THERE. WE  
10:19:49 19 DIDN'T HAVE COMMERCIAL IP ROUTERS, THE INTERNET WAS AT ITS  
10:19:54 20 BIRTH, RIGHT? THIS WAS BACK IN THE MID 80'S THAT WE'RE TALKING  
10:19:58 21 ABOUT HERE.

10:19:58 22 SO MR. LOUGHEED HAD FREE REIGN TO DO WHAT HE WANTED TO DO  
10:20:03 23 WITH RESPECT TO THIS USER INTERFACE. AND HE DID THAT. AND HE  
10:20:06 24 AND OTHERS AT CISCO FOLLOWED AND DID THAT, CREATED SOMETHING  
10:20:10 25 THAT WAS UNIQUE TO CISCO.

1 AND HERE, AS HER HONOR SAID, THIS IS EXHIBIT 4791 WHERE  
2 YOU WILL FIND THIS COLLECTION, BUT THERE ARE VALID COPYRIGHTS  
3 ON THIS USER INTERFACE, THE FOUR USER INTERFACES THAT WE ARE  
4 TALKING ABOUT. THIS IS SOMETHING THAT CISCO REGISTERED, FILED  
5 WITH THE UNITED STATES GOVERNMENT.

6 AND HERE I TOLD YOU I WAS GOING TO TALK ABOUT THE LAW WITH  
7 YOU. AND I THINK THIS ONE IS REALLY IMPORTANT. THIS IS THE  
8 INSTRUCTION, INSTRUCTION NUMBER 32, THAT HER HONOR READ TO YOU.  
9 AND THIS IS THE ONE ON ORIGINALITY, RIGHT? IT'S IMPORTANT  
10 HERE. IT SAYS "AN ORIGINAL WORK MAY INCORPORATE ELEMENTS TAKEN  
11 FROM PRIOR WORKS."

12 SO REMEMBER WHEN DR. BLACK WAS TALKING ABOUT, WAIT A  
13 MINUTE, I FOUND THIS WORD IN A PRIOR SYSTEM, I FOUND THIS OTHER  
14 WORD IN AN RFC, THEY TALKED ABOUT, THESE INDUSTRY STANDARDS FOR  
15 PROTOCOLS, RIGHT, I FOUND THOSE.

16 THAT DOESN'T MATTER. THAT DOESN'T MEAN THAT A WORK IS NOT  
17 ORIGINAL OR CREATIVE. IT'S GOT TO BE DONE INDEPENDENTLY BY THE  
18 WORK'S AUTHOR.

19 WELL, WE KNOW THAT WAS THE CASE, RIGHT? WE KNOW THAT WAS  
20 THE CASE HERE BECAUSE DR. BLACK, WHO DID THOUSANDS OF HOURS OF  
21 WORK, HE TOLD US ON THE STAND, HE DIDN'T FIND THAT THESE  
22 COMMANDS WERE USED BY ANYONE ELSE PRIOR TO CISCO, RIGHT? THAT  
23 IS UNDISPUTED. THAT'S THE EVIDENCE.

24 BUT THEN LET'S GO FORWARD. BECAUSE YOU KNOW, WE TALK  
25 ABOUT CREATIVITY A LOT OF TIMES IN GENERAL, RIGHT, WHEN WE

1 MIGHT BE TALKING TO OUR FRIENDS, WE ARE REFERRING TO, IS THAT  
2 REALLY CREATIVE, IS THAT BOOK CREATIVE, THOSE KINDS OF THINGS.

3 THAT'S NOT WHAT WE ARE TALKING ABOUT HERE. WE ARE NOT  
4 TALKING ABOUT SHAKESPEARE OR PICK YOUR FAVORITE AUTHOR, WE'VE  
5 HEARD SHAKESPEARE A FEW TIMES THROUGHOUT THE TRIAL, SO I USED  
6 THAT ONE. WE ARE TALKING ABOUT SOME MINIMAL LEVEL OF  
7 CREATIVITY, THAT'S WHAT'S AT ISSUE HERE.

8 AND WE KNOW THERE WAS, RIGHT? I'M GOING TO GO THROUGH  
9 SOME OF THE TESTIMONY WE HEARD. BUT THINK ABOUT IT, WHAT DOES  
10 ARISTA KEEP SAYING HERE? WHAT HAVE THEY TRIED TO PROVE IN THIS  
11 CASE? THAT PEOPLE IDENTIFY THE CISCO USER INTERFACE WITH  
12 CISCO, RIGHT? THAT'S WHAT THEY TOLD YOU.

13 WELL IF THEY IDENTIFY IT WITH CISCO, THAT HAS TO BE  
14 CREATIVE, THAT HAS TO BE UNIQUE TO CISCO BECAUSE YOU CAN'T  
15 IDENTIFY SOMETHING THAT ISN'T CREATIVE WITH ITS AUTHOR.

16 AND WE KNOW JUNIPER, FOR EXAMPLE, CAME UP WITH SOMETHING  
17 TOTALLY DIFFERENT. AND PEOPLE, INCLUDING ARISTA, THEY IDENTIFY  
18 THAT WITH JUNIPER.

19 SO WHEN YOU GO BACK AND YOU ARE CONSIDERING THIS QUESTION  
20 ON ORIGINALITY AND CREATIVITY, LOOK AT THIS INSTRUCTION AND  
21 CONSIDER THAT, DON'T GET BOGGED DOWN IN WHETHER YOU THINK THIS  
22 WOULD BE A REALLY NICE BOOK TO READ, BECAUSE THAT'S NOT WHAT WE  
23 ARE TALKING ABOUT HERE. WE ARE TALKING ABOUT, WERE THERE SOME  
24 CHOICES, WERE THERE DIFFERENT THINGS THAT THEY COULD DO, AND  
25 DID THEY CREATE SOMETHING THAT PEOPLE COULD IDENTIFY AS UNIQUE

10:23:06 1 TO CISCO. AND THAT'S EXACTLY WHAT HAPPENED.

10:23:11 2 AND HERE, WE PUT THIS INTO EVIDENCE, THIS IS EXHIBIT 4789  
10:23:16 3 WHICH LISTS ALL THE 506 COMMANDS AND GIVES YOU THE DATES OF  
10:23:20 4 WHERE THEY APPEARED IN THE VARIOUS CISCO OPERATING SYSTEMS.  
10:23:23 5 BECAUSE IF YOU ARE CURIOUS ABOUT THAT, THAT'S WHY THERE'S 26  
10:23:27 6 DIFFERENT REGISTRATIONS, THERE'S DIFFERENT THINGS OVER TIME.  
10:23:29 7 AND IT WILL TELL YOU THAT, WHERE THESE THINGS FIRST APPEARED  
10:23:31 8 AND WHERE THOSE DATES ARE, FOR ALL OF THE ASSERTED COMMANDS IN  
10:23:35 9 THIS CASE.

10:23:37 10 BUT HERE, AND I TALKED ABOUT THIS POINT A BIT, IT'S --  
10:23:41 11 THIS IS IMPORTANT, THIS WAS TESTIMONY FROM DR. BLACK, DON'T GET  
10:23:45 12 CONFUSED, THESE ARE ORIGINAL, YOU KNOW THAT'S THE CASE BECAUSE  
10:23:49 13 THEY DIDN'T BRING YOU ONE SHRED OF EVIDENCE SAYING ANYBODY ELSE  
10:23:53 14 DID IT FIRST. THIS WAS CISCO, THEY WERE THE ORIGINAL AUTHOR OF  
10:23:57 15 THESE THINGS.

10:23:58 16 NOW, THE QUESTION HERE IS WHETHER CISCO HAD DESIGN  
10:24:01 17 CHOICES, WERE THERE DIFFERENT THINGS THEY COULD DO? COULD THEY  
10:24:04 18 COME UP WITH DIFFERENT COMMANDS? COULD THEY USE DIFFERENT WORD  
10:24:07 19 CHOICES? COULD THEY USE DIFFERENT ORDERING?

10:24:09 20 WE KNOW, I JUST HAVE A SAMPLING HERE OF THE VARIOUS  
10:24:12 21 WITNESSES THAT WE HEARD FROM. THAT WAS ABSOLUTELY THE CASE,  
10:24:16 22 RIGHT?

10:24:16 23 AND I'M GOING TO GO THROUGH SOME OF THESE FOR YOU AND  
10:24:19 24 HIGHLIGHT SOME OF THAT TESTIMONY AND SOME OF THE DOCUMENTATION.  
10:24:22 25 BUT YOU KNOW, JUST REMEMBER, AND YOU HEARD A LOT OF EVIDENCE

1 FROM THE PEOPLE UP THERE, AND REMEMBER WHAT YOU DID HERE, THAT  
2 THERE WERE CHOICES, THERE WERE DIFFERENT WAYS FOR PEOPLE TO DO  
3 THESE THINGS.

4 SO MR. LOUGHEED, AND THIS IS IMPORTANT, RIGHT, BECAUSE  
5 REMEMBER, WE ARE GOING BACK TO THE TIME OF CREATION, RIGHT, THE  
6 TIME OF CREATION OF THESE COMMANDS, THIS COLLECTION OF COMMANDS  
7 HERE.

8 AND AT THE TIME, THERE WEREN'T ANY OTHER DEVICES LIKE  
9 THIS, SO THERE COULDN'T BE ANY CUSTOMER EXPECTATIONS. ARISTA  
10 WANTS TO COME IN AND TELL YOU, HEY, CUSTOMERS EXPECT CERTAIN  
11 THINGS SO THAT'S WHY YOU HAVE TO DO IT THIS WAY.

12 BUT AT THE TIME THESE WERE CREATED, THERE WERE NO CUSTOMER  
13 EXPECTATIONS. THIS WAS A GREEN FIELD, I THINK WE HEARD  
14 MR. SHAFER SAY. IN OTHER WORDS, NOTHING OUT THERE. DO WHAT  
15 YOU WANT. YOU HAVE YOUR OPTIONS OUT THERE.

16 SO DON'T GET CONFUSED AS TO WHAT THINGS MIGHT BE NOW AND  
17 WHAT THE WORLD MIGHT LOOK LIKE NOW, WE'VE GOT TO GO BACK WHEN  
18 THESE WERE DONE IN ORDER TO MAKE THAT DETERMINATION.

19 AND WE HEARD FROM MS. ULLAL, THE SAME THING, RIGHT? THIS  
20 IS UP ON THE STAND NOW, IT SAYS, "DO YOU UNDERSTAND THAT CLI  
21 COMMAND EXPRESSIONS COULD BE DIFFERENT WITHOUT AFFECTING THE  
22 UNDERLYING FUNCTIONALITY?"

23 "THEY CAN. THEY ARE INDUSTRY STANDARD METHODS OF  
24 COMMUNICATION, BUT THERE ARE DIFFERENT WORDS, IS THAT WHAT YOU  
25 MEAN?"

10:25:43 1 "YES."

10:25:44 2 "YEAH, THERE CAN BE A DIFFERENT CHOICE OF WORDS."

10:25:46 3 SO THIS IS CISCO'S -- OR EXCUSE ME, ARISTA'S OWN CEO  
10:25:51 4 CONFIRMING THAT YES, THERE CAN BE A DIFFERENT CHOICE OF WORDS.  
10:25:54 5 YOU CAN DO DIFFERENT THINGS IN ORDER TO SPECIFY THE SAME  
10:25:59 6 UNDERLYING FUNCTIONALITY.

10:25:59 7 AND WE SAW MORE EVIDENCE OF THAT. YOU KNOW, FOR EXAMPLE,  
10:26:02 8 MR. DUDA CONFIRMED THAT THERE CAN BE DISCUSSIONS ABOUT THESE  
10:26:06 9 THINGS. I THINK HIGH EVEN SAID, WE MAY HAVE COPYRIGHTS IN SOME  
10:26:11 10 OF OUR OWN CLI COMMANDS. YOU MAY RECALL THAT TESTIMONY. BUT  
10:26:14 11 THERE MAY BE DISCUSSIONS AND PEOPLE DISAGREE.

10:26:16 12 COME ON, IF THERE ARE DISCUSSIONS THAT ARE LENGTHY  
10:26:18 13 DISCUSSIONS, AND WE HEARD ABOUT SOME OF THIS WITH THE  
10:26:21 14 PARSER-POLICE E-MAIL, AND PEOPLE ARE DISAGREEING ABOUT HOW TO  
10:26:24 15 DO THIS, THERE ARE MANY WAYS TO DO IT.

10:26:28 16 AND HERE'S ANOTHER IMPORTANT THING. YOU WILL REMEMBER I  
10:26:30 17 TALKED ABOUT THIS AT THE BEGINNING IN THE OPENING, THE  
10:26:32 18 SEQUENCING OF THE WORDS, RIGHT, AND HOW THAT FITS INTO THE  
10:26:35 19 STRUCTURE OF THE USER INTERFACE.

10:26:37 20 SO THAT -- YOU KNOW, THE ENGINEERS, THE ADMINISTRATORS OUT  
10:26:42 21 THERE THAT ARE RUNNING THESE NETWORKS, WHEN THEY ARE ON THE HOT  
10:26:45 22 SEAT AND THEY'VE GOT TO GET THEIR NETWORK UP AND RUNNING TO  
10:26:47 23 FIGURE OUT WHAT'S GOING ON, THEY CAN FIGURE OUT WHAT THESE  
10:26:51 24 COMMANDS ARE GOING TO BE. THAT COMES IN THE SEQUENCING.

10:26:54 25 AND DR. BLACK SAYS HE DIDN'T EVEN ADDRESS THAT, RIGHT? HE

1 AGREED THAT THE SEQUENCING, YOU CAN MAKE DIFFERENT CHOICES AND  
2 THAT THAT CAN BE IMPORTANT AND CREATIVE, BUT HE DOESN'T ADDRESS  
3 IT, HE DIDN'T OFFER AN OPINION ON WHAT YOU ARE GOING TO HAVE TO  
4 DO WITH THE USER INTERFACE THAT'S AT ISSUE HERE.

5 AND THEN I GET TO MR. SHAFER. AND WE TALKED ABOUT THIS,  
6 AND THIS IS IMPORTANT. BECAUSE REMEMBER, I DON'T THINK THERE'S  
7 ANY DISPUTE IN THIS CASE THAT JUNOS, AND DON'T GET THAT  
8 CONFUSED WITH JUNOS-E WHICH IS A DIFFERENT END-OF-LIFE  
9 OPERATING SYSTEM.

10 BUT JUNOS, MR. SHAFER SET OUT TO DO THE SAME THING, RIGHT?  
11 IN OTHER WORDS, DO THE SAME THING IN TERMS OF BRINGING A USER  
12 INTERFACE THAT WOULD ALLOW CUSTOMERS TO ADDRESS THOSE SAME SETS  
13 OF CORE FEATURES THAT ALL THESE SWITCHES AND ROUTERS HAVE,  
14 RIGHT?

15 BUT HE DID IT IN A TOTAL DIFFERENT WAY. I THINK WHAT HE  
16 ACTUALLY SAID WHEN HE WAS -- I THINK THERE WAS A QUESTION, AT  
17 LEAST THE WAY I REMEMBER IT, "DID YOU SLAVISHLY COPY WHAT CISCO  
18 DID?" AND I THINK HE SAID NO, WE SLAVISHLY DID SOMETHING ELSE.

19 THEY SET OUT, SAME FUNCTIONALITY, USED SOME INDUSTRY  
20 STANDARD TERMINOLOGY, HE SAID THAT, BUT THEY CAME UP WITH A  
21 DIFFERENT USER INTERFACE THAT EVERYONE OUT THERE, INCLUDING  
22 ARISTA, BECAUSE WE SAW ARISTA'S OWN DOCUMENTS, RECOGNIZES TO BE  
23 DIFFERENT FROM THE CISCO CLI, RIGHT, THE CISCO USER INTERFACE.  
24 AND THAT'S A VERY IMPORTANT THING WHEN YOU GO BACK AND YOU  
25 CONSIDER THIS.



1 WE ALSO HEARD FROM THE GENTLEMAN FROM HP, RIGHT? AND HE  
2 CONFIRMED THAT EVEN WITHIN THE SAME COMPANY, DIFFERENT  
3 ENGINEERS CAN COME UP WITH DIFFERENT WAYS, RIGHT? AND HE  
4 ACTUALLY SHOWED US EXAMPLES. YOU WILL RECALL THAT  
5 EXHIBIT 6380, WHICH IS THAT HP DOCUMENTATION, THAT SHOWS SOME  
6 OF THE COMMANDS.

7 AND WE HAVE SOME OF THE CISCO COMMANDS OVER HERE ON THE  
8 RIGHT, AND YOU WILL SEE IN COMWARE, WHICH IS ANOTHER SWITCH  
9 THAT'S OUT THERE, THEY ARE TOTALLY DIFFERENT. SAME  
10 FUNCTIONALITY, TOTALLY DIFFERENT.

11 SO WE SAW PLENTY EXAMPLES OF THAT.

12 SO YOU KNOW, IN THE END, I'M GOING TO TALK ABOUT IT A  
13 LITTLE BIT MORE WHEN I TALK ABOUT THIS MERGER, I THINK YOU  
14 MIGHT HAVE HEARD IT FOR THE FIRST TIME IN THE JUDGE'S  
15 INSTRUCTIONS BECAUSE I DON'T BELIEVE THE WORD "MERGER" WAS EVER  
16 MENTIONED IN THE CASE.

17 AND SCÈNES À FAIRE, IT'S A FRENCH WORD, SOMETIMES LAWYERS,  
18 WE USE DIFFERENT LANGUAGES TO DESCRIBE CERTAIN OFFENSES. SO  
19 I'M GOING TO TALK ABOUT THOSE A LITTLE BIT MORE AND A LITTLE  
20 BIT ABOUT THESE ARISTA DEFENSES THERE, BUT IN TERMS OF THE  
21 ORIGINALITY AND THE CREATIVITY, THE EVIDENCE IS OVERWHELMING  
22 HERE THAT UNDER THE STANDARD THAT YOU ARE TO THE APPLY, THAT  
23 MINIMAL SPARK, THERE IS ORIGINALITY, THERE IS CREATIVITY HERE.

24 NOW THIS IS IMPORTANT, SO I WANT TO PAUSE HERE FOR A  
25 MINUTE. THIS IS JURY INSTRUCTION 36. AND YOU SEE HOW THIS IS

10:29:51 1 BROKEN DOWN, IT SAYS FIRST -- ACTUALLY I SHOULD GO BACK ONE.  
10:29:56 2 BECAUSE RIGHT ABOVE IT SAYS THERE ARE TWO WAYS THAT CISCO CAN  
10:29:59 3 MEET ITS BURDEN, IN OTHER WORDS, OF SHOWING THE COPYING.

10:30:03 4 FIRST, CISCO MAY ESTABLISH ARISTA'S COPYING THROUGH DIRECT  
10:30:06 5 EVIDENCE. AN EXAMPLE OF DIRECT EVIDENCE WOULD BE AN ADMISSION  
10:30:09 6 BY ARISTA THAT PART OR ALL OF THE WORK WAS COPIED.

10:30:12 7 THE SECOND ONE YOU SEE IT'S INTRODUCED ALTERNATIVELY, IS  
10:30:15 8 THE INDIRECT EVIDENCE, RIGHT? ACCESS, AND VIRTUAL IDENTITY.  
10:30:19 9 THOSE ARE TWO DIFFERENT THINGS. AND YOU DON'T HAVE TO DO BOTH  
10:30:23 10 OF THEM BECAUSE YOU KNOW WHY, THIS CASE, THIS IS A DIRECT  
10:30:26 11 COPYING CASE, RIGHT? THERE'S DIRECT EVIDENCE OF COPYING HERE,  
10:30:30 12 THERE ARE A MULTITUDE OF ADMISSIONS. AND I'M GOING TO GO  
10:30:34 13 THROUGH THOSE THINGS.

10:30:35 14 SO YOU DON'T NEED TO GET TO THE SECOND ONE HERE. THE  
10:30:39 15 SECOND ONE IS SATISFIED AS WELL, YOU KNOW, IF WE WENT THROUGH  
10:30:43 16 THAT, BUT YOU ARE GOING TO HEAR A LOT FROM ARISTA ABOUT THAT  
10:30:46 17 SECOND METHOD. YOU DON'T NEED TO DO IT BECAUSE THERE'S AN  
10:30:49 18 OVERWHELMING AMOUNT OF DIRECT EVIDENCE OF COPYING HERE.

10:30:52 19 AND LET ME JUST TALK ABOUT SOME OF THAT.

10:30:56 20 WELL, WE STARTED THE TRIAL, I THINK THIS MIGHT HAVE BEEN  
10:31:00 21 ONE OF THE FIRST THINGS I SHOWED YOU IN OPENING WHEN I TOLD YOU  
10:31:04 22 THIS IS GOING TO BE A LITTLE BIT OF A STRANGE CASE FOR  
10:31:07 23 COPYRIGHTS BECAUSE USUALLY THERE'S SOME DISPUTE ABOUT WHETHER  
10:31:11 24 THERE WAS COPYING.

10:31:12 25 NO DISPUTE HERE. MR. DUDA, AND YOU HEARD THIS, THIS IS

10:31:14 1 EXHIBIT 203-A. COMES FROM AN INDUSTRY INTERVIEW THEY HAD. "WE  
10:31:23 2 ACTUALLY COPIED THIS SLAVISHLY. YOU KNOW, IT'S LIKE EVEN THE  
10:31:27 3 THINGS THAT WE THOUGHT WERE REALLY SILLY, WE WENT AHEAD AND  
10:31:30 4 COPIED THEM ANYWAY."

10:31:32 5 YOU CAN'T GET A STRONGER ADMISSION THAN THIS. WE COPIED  
10:31:35 6 IT, EVEN THE PARTS WE DIDN'T LIKE, WE COPIED.

10:31:38 7 AND HERE, THIS IS EXHIBIT 197, WHICH IS GOING TO BE AN  
10:31:42 8 IMPORTANT EXHIBIT. YOU WILL RECALL I TALKED ABOUT A NUMBER OF  
10:31:45 9 THINGS IN THIS EXHIBIT WITH MR. SADANA, SO IT'S ONE, I BELIEVE  
10:31:48 10 WAS IN YOUR JUROR NOTEBOOKS, AND I WOULD REALLY LIKE YOU TO GO  
10:31:53 11 AND TAKE A LOOK AT IT. BUT YOU WILL SEE HERE, THEY SAY FLAT  
10:31:56 12 OUT, "WE PICKED CISCO IOS AS THE CLI MODEL FOR OUR PRODUCTS."

10:32:00 13 "JUNOS, AGAIN, DIFFERENT ON THE CREATIVITY POINT, MAY BE A  
10:32:04 14 LOT BETTER, BUT WE DECIDED TO EMBRACE IOS."

10:32:08 15 AND UP ON THE STAND HERE, MR. SADANA TOLD US WHY THAT WAS  
10:32:11 16 THE CASE, REMEMBER, WHEN I ASKED HIM, HE SAID WE DID THAT  
10:32:15 17 BECAUSE WE WERE MORE INTERESTED IN TARGETING CISCO'S CUSTOMERS  
10:32:18 18 THAN WE WERE JUNIPER'S CUSTOMERS. THAT'S THE REASON WHY.  
10:32:22 19 THAT'S WHY THEY TOOK THE CISCO CLI AND USED IT AS A MODEL TO  
10:32:27 20 COPY TO CREATE THEIR USER INTERFACE, THEIR BEING ARISTA.

10:32:33 21 AND HERE, THIS IS EXHIBIT 295, THIS IS ARISTA'S OWN STYLE  
10:32:37 22 GUIDE. THIS IS A LITTLE BIT -- YOU WILL RECALL WE TALKED ABOUT  
10:32:40 23 THAT PARSER-POLICE MANIFESTO A FEW TIMES DURING THE CASE, THIS  
10:32:45 24 IS ARISTA'S VERSION OF THAT, RIGHT? AND THIS IS IN EVIDENCE AS  
10:32:48 25 WELL.

1 AND IT SAYS, "THE FIRST AND PROBABLY MOST IMPORTANT  
2 CONVENTION IN OUR CLI IS TO FOLLOW THE INDUSTRY STANDARD."

3 NOW WE KNOW FROM OTHER THINGS, WE HEARD FROM MR. DALE AT  
4 ARISTA, INDUSTRY STANDARD WAS THEIR JOKE FOR BEING JUST LIKE  
5 CISCO. SO WE KNOW WHAT THAT IS.

6 THEN IT GOES ON TO SAY, "IN LOOKING FOR INDUSTRY STANDARD  
7 MODELS TO FOLLOW, PLEASE LOOK IN THE FOLLOWING ORDER OF  
8 PREFERENCE. IOS, NX-OS, IOS XR," ALL CISCO OPERATING SYSTEMS.

9 SO THAT WAS THEIR MANUAL, THAT'S WHAT THEY WERE TELLING  
10 THE ENGINEERS TO DO.

11 AND WHAT ELSE? THIS IS EXHIBIT 189 HERE. AND THIS WE  
12 TALKED ABOUT WITH MR. DUDA.

13 NOW LET ME JUST BE CLEAR HERE, I'M NOT SAYING THAT IT'S  
14 WRONG TO HAVE A COMPETITOR SWITCH, I'M NOT SAYING THAT AT ALL,  
15 PEOPLE DO COMPETITIVE TESTING AND THOSE KINDS OF THINGS, NOBODY  
16 IS SAYING THAT.

17 WHAT THIS IS EVIDENCE OF, THOUGH, IS THE DIRECT COPYING.  
18 BECAUSE REMEMBER WHAT MR. DUDA SAID, THIS WAS SOMETHING THAT  
19 ALL OF THE ENGINEERS WERE INSTRUCTED TO TAKE A LOOK AT SO THAT  
20 THEY COULD MATCH THE CISCO SYNTAX, IN OTHER WORDS, MATCH THAT  
21 USER INTERFACE THAT CISCO WAS USING.

22 AND THEY HAD THE SWITCH TO SEE WHAT THOSE THINGS WERE SO  
23 THEY COULD GET IT EXACTLY RIGHT SO THAT THEY COULD THEN, IN  
24 TURN, GO OUT AND TELL CUSTOMERS, WE ARE CISCO, RIGHT, YOU KNOW  
25 CISCO, YOU KNOW US.

10:34:11 1 AND AGAIN, IT'S THOSE CORE SETS OF COMMANDS, THE IMPORTANT  
10:34:17 2 FEATURES AND FUNCTIONS. AND YOU HEARD TESTIMONY ABOUT THIS.  
10:34:20 3 THE TROUBLESHOOTING, THE CONFIGURATION, THE THINGS THAT THESE  
10:34:25 4 USER INTERFACES, THE CLI, IS PRIMARILY USED FOR AND IS WHAT  
10:34:29 5 THESE ENGINEERS PRIMARILY RELY ON THIS CLI FOR.

10:34:34 6 THAT'S WHAT WAS COPIED. AND MR. SADANA SAYS IT AS CLEARLY  
10:34:37 7 AS IT COULD POSSIBLY BE, THEY INTENTIONALLY COPIED THAT, RIGHT,  
10:34:42 8 FOR THOSE CORE FEATURES? YES.

10:34:45 9 SO MORE DIRECT EVIDENCE OF COPYING. MR. DUDA, HE SAID THE  
10:34:51 10 SAME THING UP ON THE STAND, RIGHT? WE DID COPY THOSE.

10:34:55 11 AND IT IS NO COINCIDENCE THAT ARISTA HAS SO MANY CLI  
10:34:59 12 COMMANDS THAT WERE TAKEN FROM CISCO'S USER INTERFACE.

10:35:02 13 IN OTHER WORDS, IT WASN'T JUST THAT THEY HAD ACCESS, THEY  
10:35:05 14 DIDN'T COME UP WITH THE SAME THING, THEY COPIED THEM, THEY SET  
10:35:08 15 OUT TO COPY THEM AND THEY SUCCEEDED IN DOING THAT.

10:35:13 16 WHAT ELSE DO WE KNOW? YOU WILL RECALL THIS WAS THE OTHER  
10:35:17 17 TIME I WAS KIND OF OVER HERE WHEN I READ YOU THAT STIPULATION.  
10:35:22 18 ARISTA ADMITTED IN ITS RESPONSE TO THE ANSWER, AND THIS WILL BE  
10:35:26 19 EXHIBIT 4821 THAT LISTS ALL THE COMMANDS, INCLUDES THE COMMANDS  
10:35:29 20 THAT ARE AT ISSUE IN THE CASE HERE, THAT THEY USED ALL OF  
10:35:32 21 THESE, RIGHT? THERE'S NO DISPUTE ABOUT THAT.

10:35:36 22 SO IF YOU WANT TO GO BACK AND TAKE A LOOK AT THAT.

10:35:38 23 AND THEN WHAT ELSE DO WE HAVE? WE HAVE THE TWO  
10:35:42 24 INTERROGATORY RESPONSES WE PUT INTO EVIDENCE, THOSE ARE  
10:35:46 25 EXHIBITS 4822 AND 4823 WHERE ARISTA RESPONDED TO OUR QUESTIONS,

1 CISCO'S QUESTIONS, AND SAID YEP, HERE'S WHERE THEY ARE, THESE  
2 ARE THE COMMANDS, AND THIS IS WHEN I PUT THEM IN THE OPERATING  
3 SYSTEM AND THIS IS THE VERSION OF THE OPERATING SYSTEM THAT  
4 THEY WENT INTO.

5 SO THAT'S ALL THERE. THERE'S NO DISPUTE ABOUT THAT.

6 AND THEN THIS IS IMPORTANT, RIGHT? DR. BLACK, HE TOLD US  
7 HE PUT A LOT OF EFFORT INTO THIS CASE, RIGHT? A THOUSAND  
8 HOURS, I THINK HE SAID, OR SOMEWHERE AROUND THERE, HE PUT A LOT  
9 OF EFFORT INTO THIS CASE.

10 AND I ASKED HIM THIS, RIGHT, "THERE ARE 506 THAT ARE AT  
11 ISSUE IN THIS CASE, THEY TOOK THEM, RIGHT?"

12 AND WHAT DID HE RESPOND? "DON'T KNOW HOW THEY GOT THERE,  
13 BUT THEY ARE PRESENT IN BOTH PRODUCTS."

14 YOU DIDN'T HEAR ONE BIT OF TESTIMONY FROM DR. BLACK SAYING  
15 THESE WERE NOT COPIED, RIGHT? HE LOOKED AT THIS FOR A THOUSAND  
16 HOURS. HE HAD ACCESS TO ALL THE ARISTA ENGINEERS AND ALL OF  
17 THE EVIDENCE IN THE CASE, HE NEVER ONCE OFFERED YOU THE OPINION  
18 THAT THEY WERE DIFFERENT, HE NEVER ONCE OFFERED YOU THE OPINION  
19 THAT THE COMMANDS WEREN'T COPIED.

20 AND HERE, THIS IS THEIR OWN EXHIBIT, SHOWS THE COMMANDS  
21 SIDE BY SIDE. 9037. AND I WANT TO -- AND THIS IS THEIR OWN  
22 EXHIBIT, AND IT WILL SHOW SIDE BY SIDE, WHAT THE COMMANDS ARE  
23 IN THE CISCO USER INTERFACE, THE 506, AND WHAT THEY ARE IN  
24 ARISTA.

25 NOW, THIS ONE, THEY NEVER SAID THAT THE COMMANDS WERE

1 DIFFERENT BASED UPON THIS DOCUMENT, THIS WAS SOMETHING THAT  
2 DR. BLACK ARGUED DURING HIS TRANSFORMATION DISCUSSION, WHICH  
3 I'M GOING TO GET TO IN A MINUTE WITH THE FAIR USE. AND HE  
4 REFERRED TO PARAMETERS. THAT OH, ON THE CISCO SIDE YOU DON'T  
5 INCLUDE THE PARAMETERS.

6 NOW HE NEVER SAID THE PARAMETERS WERE DIFFERENT, RIGHT?  
7 AND WE KNOW FROM DR. ALMEROOTH THAT THEY, IN FACT, WEREN'T  
8 BECAUSE REMEMBER THAT TESTIMONY ABOUT HEY, YOU CAN COPY AND  
9 PASTE THE CONFIGURATION FILE AND DROP IT RIGHT INTO AN ARISTA  
10 SWITCH AND IT WORKS AND DR. ALMEROOTH SAYS YEAH, THAT TELLS ME  
11 THAT ALL OF THESE PARAMETERS AND THINGS ARE THE SAME.

12 DR. BLACK NEVER SAID ANYTHING DIFFERENT.

13 SO THIS EXHIBIT, THEIR EXHIBIT 9037, SHOWS YOU THE SAME  
14 THING, THAT IT'S THE SAME SET OF COMMANDS IN THE CISCO USER  
15 INTERFACES AS WHAT'S IN ARISTA.

16 SAME, THIS IS 4800. THIS GOES TO THE SCREEN OUTPUTS, THE  
17 RESPONSES, THE OUTPUTS WE TALKED ABOUT. NO DENIAL THOSE WERE  
18 COPIED AS WELL. YOU DIDN'T HEAR DR. BLACK GET UP THERE OR ANY  
19 OTHER WITNESS GET UP THERE.

20 AND IN FACT, MR. DUDA, THEIR CHIEF TECHNICAL OFFICER, SAID  
21 YES, THAT WAS DONE, THEY REPLICATED SOME OF THE SCREEN OUTPUTS  
22 FROM CISCO PRODUCTS, AND THAT WAS DONE INTENTIONALLY BY ARISTA.

23 THAT'S RIGHT. AGAIN, MORE DIRECT EVIDENCE OF COPYING.

24 SAME HERE, THIS IS EXHIBIT 4799, I'M GIVING YOU SOME OF  
25 THE EXHIBIT NUMBERS FOR THE USER INTERFACE ELEMENTS THAT

10:38:46 1 YOUR HONOR HAD READ TO YOU IN THE INSTRUCTIONS.

10:38:49 2 AGAIN, NO TESTIMONY THAT THESE WEREN'T COPIED, RIGHT?

10:38:53 3 AND THEN ONCE AGAIN ON THE MODES AND PROMPTS, THIS IS  
10:38:59 4 EXHIBIT 4794, ONCE AGAIN, NO TESTIMONY THAT THESE WEREN'T  
10:39:03 5 COPIED.

10:39:04 6 SO WITH THAT, YOU DON'T HAVE TO GET TO THAT LONG -- I  
10:39:09 7 THINK IT'S INSTRUCTION 39, PERHAPS, I MIGHT BE WRONG THERE, BUT  
10:39:14 8 IT'S THE ONE WHERE YOU GO THROUGH AND YOU RECALL THE JUDGE READ  
10:39:20 9 ABOUT INDIRECT, ABOUT WHICH ELEMENTS YOU CAN MATCH UP AND  
10:39:23 10 WHETHER THERE'S VIRTUAL IDENTITY. YOU DON'T EVEN NEED TO GO  
10:39:27 11 THERE IN THIS CASE, RIGHT, YOU DON'T NEED TO GO THERE BECAUSE  
10:39:30 12 THIS IS A CASE WITH OVERWHELMING EVIDENCE OF DIRECT COPYING.

10:39:34 13 SO WHEN YOU SEE THAT, THE NEXT STEP THAT YOU HAVE IS TO  
10:39:38 14 DETERMINE WHETHER THE COPYING WAS, IN THE INSTRUCTION SAID,  
10:39:42 15 DE MINIMUS, I LIKE TO SAY TRIVIAL, I THINK THAT WAS IN THE  
10:39:46 16 INSTRUCTIONS AS WELL. IN OTHER WORDS, WAS THIS COPYING  
10:39:51 17 TRIVIAL?

10:39:51 18 WELL, HERE'S THE INSTRUCTION. THIS IS INSTRUCTION 41  
10:39:54 19 WHICH IS THE NEXT ONE YOU GO TO ONCE YOU DETERMINE THAT THERE'S  
10:39:58 20 DIRECT EVIDENCE OF COPYING.

10:39:59 21 AND IT SAYS, "THE QUESTION IS WHETHER IT WAS MORE THAN A  
10:40:03 22 TRIVIAL AMOUNT. AND WHEN YOU ARE DETERMINING THAT, YOU LOOK AT  
10:40:05 23 THE QUALITATIVE AS WELL AS THE QUANTITATIVE SIGNIFICANCE."

10:40:08 24 IN OTHER WORDS, WHAT YOU TOOK, WAS IT IMPORTANT TO THE  
10:40:12 25 WORK, RIGHT? IMPORTANT TO CISCO'S USER INTERFACE. WELL,



10:40:15 1 THERE'S NO QUESTION THAT THIS WAS IMPORTANT TO CISCO'S USER  
10:40:18 2 INTERFACE, AND LET'S TALK ABOUT SOME OF THAT EVIDENCE.

10:40:22 3 YOU KNOW, HERE, THIS IS ARISTA, THIS IS EXHIBIT 488.  
10:40:30 4 AGAIN, ONE OF ARISTA'S OWN DOCUMENTS IN THE CASE. AND THIS ONE  
10:40:33 5 YOU WILL RECALL DR. ALMEROOTH EXPLAINED A BIT, WHAT THIS WAS,  
10:40:39 6 WAS TESTING THAT ARISTA HAD COMMISSIONED ITSELF TO DETERMINE  
10:40:42 7 FROM A USER STANDPOINT, RIGHT?

10:40:44 8 IN OTHER WORDS THESE ADMINISTRATORS, USING THIS USER  
10:40:47 9 INTERFACE, HOW CLOSE IT WAS, RIGHT, HOW CLOSE IS IT TO THE  
10:40:51 10 CISCO USER INTERFACE.

10:40:53 11 AND YOU WILL SEE THAT HERE. FIRST PERFORMED ON THE IOS  
10:40:58 12 PLATFORM, THEN THE EOS PLATFORM.

10:41:01 13 NOW WHAT WAS CONCLUDED? THIS IS, AGAIN, ARISTA'S OWN  
10:41:05 14 SURVEY. THE ARISTA NETWORKS PLATFORM CONTAINED NO SIGNIFICANT  
10:41:10 15 DEVIATION FROM ESTABLISHED IOS NORMS.

10:41:13 16 AND HERE YOU WILL RECALL THERE WAS SOME DISCUSSION IN THE  
10:41:16 17 BAR GRAPH, AND IF WE LOOK AT IOS IN COMPARING THAT TO EOS, IT  
10:41:21 18 ACTUALLY IS, ACCORDING TO THE STUDY ITSELF, AND THERE'S ANOTHER  
10:41:27 19 PAGE, I DON'T HAVE THAT HERE, BUT YOU WILL RECALL THAT  
10:41:30 20 DR. ALMEROOTH WENT THROUGH, AND THERE'S ANOTHER PAGE IN THIS  
10:41:36 21 DOCUMENT THAT TELLS YOU WHAT A FIVE SCORE IS AND IT TELLS YOU  
10:41:39 22 IT'S IDENTICAL.

10:41:41 23 SO THINK ABOUT IT, THEY DO A STUDY FROM THE STANDPOINT OF  
10:41:45 24 THE USERS TO SAY THEY ARE IDENTICAL TO CISCO, THAT THEY COPIED  
10:41:48 25 THE CORE FEATURES, YOU KNOW, THE COMMANDS CORRESPONDING TO THE

10:41:51 1 CORE FEATURES IN THESE SWITCHES. OF COURSE, THAT'S NOT A  
10:41:54 2 TRIVIAL AMOUNT. YOU ARE GOING OUT THERE AND YOU ARE DOING IT  
10:41:57 3 FOR THE PURPOSE OF SAYING FROM THE STANDPOINT OF A USER, CAN I  
10:42:00 4 TELL PEOPLE THAT I'M CISCO, RIGHT?

10:42:04 5 AND WHAT DID THEY USE? THIS IS AGAIN, IN THAT SAME  
10:42:08 6 EXHIBIT 488, THAT USER SURVEY, WHAT DID THEY USE TO DETERMINE  
10:42:12 7 THAT? THESE ARE THE COPIED COMMANDS, RIGHT? THAT'S WHAT THEY  
10:42:16 8 MUCH WERE TESTING.

10:42:18 9 THEY ARE OUT THERE TESTING TO DETERMINE WHETHER THE COPIED  
10:42:20 10 COMMANDS ARE THE SAME FROM THE STANDPOINT OF THE USER SO THAT  
10:42:24 11 THEY CAN TELL PEOPLE IT'S THE SAME THING. OF COURSE THAT'S A  
10:42:27 12 SUBSTANTIAL PART AN IMPORTANT PART OF CISCO'S WORK. THAT'S  
10:42:31 13 WHAT MADE IT UNIQUELY CISCO.

10:42:34 14 OH, AND I DO HAVE THIS, I APOLOGIZE, THIS IS THE KEY,  
10:42:39 15 RIGHT? AND IF WE LOOK AT THE SCORE OF FIVE, WHICH EOS IS  
10:42:44 16 ALMOST AT A FIVE, THE SYNTAX FOR THIS ACTION IS IDENTICAL TO  
10:42:48 17 IOS, OKAY. IN OTHER WORDS, IT'S THE SAME.

10:42:53 18 AND WHAT ELSE? THIS IS A DOCUMENT IN TERMS OF WHY THEY  
10:42:57 19 WERE DOING IT AGAIN, WHETHER THIS WAS IMPORTANT, AN IMPORTANT  
10:43:00 20 PART OF THE WORK.

10:43:01 21 AND THIS IS AN E-MAIL FROM MR. FOSS TO SOMEONE AT  
10:43:05 22 FACEBOOK. AND I KNOW THERE WAS SOME TESTIMONY THAT PERHAPS  
10:43:07 23 THEY DIDN'T MAKE THE SALE TO FACEBOOK AT THIS TIME, THAT'S  
10:43:09 24 FINE. THAT'S NOT WHAT I'M TALKING ABOUT HERE.

10:43:12 25 BUT WHAT I'M TALKING ABOUT IN EXHIBIT 229 IS THIS,

10:43:16 1 MR. FOSS, IS AN ARISTA EMPLOYEE, THAT'S ONE OF THEIR HIGH END  
10:43:21 2 MARKETING FOLKS, THAT SAYS, "THE CLI COMMANDS ON OUR SWITCH ARE  
10:43:25 3 IDENTICAL TO CISCO IOS, SO THERE SHOULD BE NO LEARNING CURVE TO  
10:43:29 4 GET IT CONFIGURED," RIGHT?

10:43:31 5 SO THEY TOOK WHAT THEY NEEDED SO THAT THEY COULD GO OUT  
10:43:35 6 AND TELL CUSTOMERS WE ARE IDENTICAL TO IOS SO THAT YOU DON'T  
10:43:38 7 NEED TO RETRAIN YOUR PEOPLE, YOU DON'T NEED TO DO ANYTHING, YOU  
10:43:42 8 KNOW CISCO, YOU KNOW US.

10:43:45 9 AND AGAIN, HERE'S ANOTHER, THIS IS AN E-MAIL EXCHANGE  
10:43:49 10 BETWEEN A POTENTIAL CUSTOMER, MR. DUDA, WE ARE UP TO 2010 NOW.  
10:43:54 11 AND IT SAYS, THIS IS THE CUSTOMER, "YOU STATED THAT THE ARISTA  
10:43:56 12 CLI IS ALMOST EXACTLY LIKE THE CISCO CLI," RIGHT? THAT'S WHAT  
10:44:00 13 HE SAYS.

10:44:01 14 AND WHAT DO THEY GO ON TO SAY IN THE E-MAIL? THIS IS  
10:44:04 15 EXHIBIT 185, AND I WON'T READ ALL OF THIS, BUT WHAT THE  
10:44:09 16 RESPONSE IS, "OH, YEAH. AND BY THE WAY, WE DON'T HAVE OUR OWN  
10:44:12 17 DOCUMENTATION YET, BUT THAT'S FINE, JUST READ THE CISCO  
10:44:15 18 DOCUMENTATION, BECAUSE OUR PRODUCTS ARE EXACTLY THE SAME."

10:44:19 19 SO THEY TOOK WHAT THEY NEEDED, SO THAT THEY COULD TELL  
10:44:23 20 CUSTOMERS THEY ARE THE SAME, AND YOU DON'T NEED TO TRAIN, YET  
10:44:26 21 THEY WANT TO COME IN HERE IN COURT AND TELL YOU WE DIDN'T TAKE  
10:44:29 22 ANYTHING, WE DIDN'T TAKE VERY MUCH, WHAT WE TOOK WAS A TRIVIAL  
10:44:33 23 AMOUNT.

10:44:34 24 SO THINK ABOUT THAT WHEN YOU GO BACK INTO THE ROOM AND  
10:44:39 25 THINK ABOUT WHETHER THAT MAKES ANY SENSE.

10:44:43 1 WHAT ELSE DID WE HEAR? WELL, WE HEARD THAT, AND I THINK  
10:44:47 2 MR. SADANA WAS THE ONE THAT PERHAPS TALKED ABOUT THIS, COULD BE  
10:44:52 3 SOME MORE, BUT REMEMBER WE HEARD, WELL, MAYBE AT THE BEGINNING,  
10:44:55 4 RIGHT, EARLY ON, 2009, 2010 TIMEFRAME, WE NEEDED TO BE JUST  
10:45:01 5 LIKE CISCO, WE NEEDED TO BE ABLE TO TELL PEOPLE THAT WE WERE  
10:45:04 6 THE SAME SO WE COULD GET OUR FOOT IN THE DOOR, RIGHT? BUT  
10:45:08 7 AFTER THAT IT WASN'T IMPORTANT. WE STARTED GETTING INTO OTHER  
10:45:11 8 TYPES OF BUSINESS, CLOUD COMPUTING, THINGS LIKE THAT.

10:45:14 9 BUT THAT'S NOT WHAT WE SAW, RIGHT? ARISTA DIDN'T STOP  
10:45:18 10 ADDING CISCO COMMANDS FOR ITS CORE FEATURES AND FUNCTIONS. AS  
10:45:23 11 THEY ADDED MORE CORE FEATURES, MORE FEATURES TO ITS ROUTER --  
10:45:27 12 OR EXCUSE ME -- THE SWITCHES THAT ARE AT ISSUE IN THE CASE, IT  
10:45:30 13 ADDED MORE CISCO COMMANDS. AND YOU WILL SEE THAT HERE. OVER  
10:45:33 14 TIME, THAT MORE, AND MORE, AND MORE WERE ADDED.

10:45:38 15 WELL, HERE YOU WILL RECALL THIS -- WELL, MAYBE YOU WILL  
10:45:42 16 RECALL BUT I WILL REMIND YOU IF YOU DON'T, THIS IS A GRAPH THAT  
10:45:46 17 KIND OF SHOWS THE NUMBER OF COMMANDS THAT ARISTA COPIED FROM  
10:45:50 18 CISCO OVER TIME.

10:45:51 19 AND THIS IS IMPORTANT HERE BECAUSE YOU WILL SEE FROM THE  
10:45:54 20 GRAPH, YEAH, IT INCREASED SIGNIFICANTLY OVER TIME, INCLUDING UP  
10:46:01 21 THROUGH THE FILING OF THIS LAWSUIT; RIGHT, IN 2014.

10:46:08 22 I PUT A COUPLE OF THINGS ON HERE BECAUSE WE HEARD  
10:46:11 23 TESTIMONY ABOUT THIS, REMEMBER BACK IN 2008, ARISTA IS  
10:46:14 24 BASICALLY IN THIS LOW LATENCY MARKET. IN OTHER WORDS, THOSE  
10:46:17 25 FINANCIAL COMPANIES THAT THEY WANTED TO BE ABLE TO GIVE HIGH

10:46:20 1 SPEED TRADES AND THINGS TO, THAT'S WHAT THEY WERE FOCUSED ON.  
10:46:23 2 AND I THINK MR. DUDA SAID, WELL, OUR PRODUCT HAD FEWER  
10:46:27 3 FEATURES, AND MR. SADANA DID AS WELL.

10:46:29 4 WELL, THAT'S 2008, AND SURE THERE ARE LESS FEATURES AND  
10:46:34 5 THEREFORE LESS COMMANDS THAT THEY COPIED, BUT NOW WE ARE UP TO  
10:46:38 6 2011, 2012 WHEN THEY ARE GETTING INTO THE DATA CENTER MARKET,  
10:46:42 7 AND WE HEARD THAT FROM MR. ULLAL, AMONG OTHER FOLKS.

10:46:45 8 AND WHAT DO WE SEE? THEY CONTINUE. AS THEY ADD THESE  
10:46:49 9 FEATURES FOR THE DATA CENTER MARKET, THEY CONTINUE TO COPY  
10:46:52 10 CISCO USER INTERFACE COMMANDS, RIGHT?

10:46:55 11 SO ON THE ONE HAND, THEY WANT TO TELL YOU IT WASN'T  
10:46:59 12 IMPORTANT TO US, OUR DATA CENTER, OR THE CUSTOMERS DIDN'T CARE  
10:47:02 13 ABOUT THIS, YET THEY CONTINUED TO COPY THESE THINGS.

10:47:05 14 AND THEN LET'S LOOK AT SOME OF THE OTHER EVIDENCE THAT WE  
10:47:09 15 SAW THAT'S RELEVANT TO THIS. THIS IS 2012. 2012. SO AFTER  
10:47:16 16 THEY ARE IN THE DATA CENTER MARKET, EXHIBIT 171, AND I WOULD  
10:47:19 17 REALLY LIKE YOU TO GO BACK AND TAKE A LOOK AT THIS ONE, I THINK  
10:47:22 18 IT'S AN IMPORTANT ONE THAT I REFERRED TO IN THE OPENING, THIS  
10:47:25 19 IS THE RESPONSE OF MR. DALE, AND WE HEARD FROM MR. DALE, HE  
10:47:30 20 TESTIFIED HERE, TALKS TO A SALES ENGINEER ABOUT HOW THEY SHOULD  
10:47:35 21 RESPOND TO A CUSTOMER.

10:47:37 22 AS OF 2012, ARE THEY TELLING CUSTOMERS OH, WE'VE DEVIATED,  
10:47:42 23 WE ARE NOT THE SAME AS CISCO ANYMORE? OF COURSE NOT. IT SAYS,  
10:47:46 24 "WE WOULD BE A PRACTICAL DROP-IN REPLACEMENT FOR CISCO, GIVEN  
10:47:51 25 THE 99.999 PERCENT SIMILARITY IN THE CLI."

10:47:57 1 HOW CAN IT BE THAT YOU COME IN TO COURT AND YOU SAY, I  
10:48:01 2 TOOK A TRIVIAL AMOUNT, BUT YOU ARE TELLING YOUR SALES ENGINEERS  
10:48:06 3 AS OF 2012 TO GO OUT AND TELL CUSTOMERS THAT WE ARE  
10:48:09 4 99.999 PERCENT SIMILAR? IT DOESN'T MAKE ANY SENSE. IT CAN'T  
10:48:14 5 BE THAT, I DON'T KNOW WHAT IT IS, .001% MAKES TRIVIAL FROM  
10:48:22 6 NONTRIVIAL, RIGHT? THAT CAN'T BE THE CASE, THAT DOESN'T MAKE  
10:48:24 7 ANY SENSE.

10:48:24 8 SO AGAIN, THEY TOOK WHAT THEY NEEDED SO THEY COULD TELL  
10:48:27 9 CUSTOMERS, WE'RE CISCO. AND THIS IS AS OF 2012.

10:48:31 10 IF WE GO FORWARD, THIS IS 2013 NOW, THIS ISN'T EARLY ON,  
10:48:36 11 THIS IS WELL AFTER THEY ARE IN THE DATA CENTER MARKET, WELL  
10:48:37 12 AFTER THEY ARE DOING THEIR CLOUD CUSTOMERS THAT WE HEARD A  
10:48:41 13 BUNCH ABOUT. AND THIS IS EXHIBIT 166 AND 166-A. THIS IS THE  
10:48:45 14 EXCERPT THAT WE SAW FROM MR. DALE'S PRESENTATION TO POTENTIAL  
10:48:49 15 CUSTOMERS AT THIS CONFERENCE.

10:48:50 16 AND WHAT DOES THIS SAY? ARISTA'S CLI COMMANDS, SAME AS  
10:48:55 17 CISCO IOS. SO ONCE AGAIN, 2013, STILL TELLING PEOPLE THEY ARE  
10:48:59 18 THE SAME.

10:49:00 19 AND IMPORTANTLY HERE, WHAT ELSE DOES HE SAY? YOU CAN  
10:49:04 20 ACTUALLY TAKE A CONFIG OFF A CATALYST OR NEXUS AND APPLY IT IN  
10:49:09 21 EXACTLY THE SAME WAY.

10:49:10 22 AND HE EXPLAINED THAT DURING HIS TESTIMONY. CATALYST AND  
10:49:12 23 NEXUS, THOSE ARE CISCO SWITCHES, RIGHT? SO THEY ARE TELLING  
10:49:16 24 POTENTIAL CUSTOMERS AT THIS CONFERENCE, TAKE YOUR CONFIG FILE  
10:49:20 25 OFF OF YOUR CISCO SWITCH AND DROP IT INTO YOUR ARISTA SWITCH

10:49:24 1 AND IT'S GOING TO WORK IN EXACTLY THE SAME WAY.

10:49:27 2 SO ONCE AGAIN, IT'S NOT TRIVIAL. I MEAN, YOU TAKE ENOUGH  
10:49:31 3 THAT YOU NEED SO THAT YOU CAN TELL PEOPLE YOU ARE THE SAME AND  
10:49:34 4 THEN YOU COME INTO COURT AND SAY IT'S TRIVIAL.

10:49:37 5 AND HERE, THIS IS 2015. AND WE SAW THIS DOCUMENT, IT'S  
10:49:42 6 EXHIBIT 545. THIS IS A PRESENTATION TO AT&T. AND AT&T, YOU  
10:49:48 7 CAN SEE FROM THIS DOCUMENT, IS WAS A BIG CISCO CUSTOMER -- IS A  
10:49:56 8 BIG CISCO CUSTOMER.

10:49:57 9 WHAT ARE THEY TELLING PEOPLE AS OF 2015? THIS IS AFTER  
10:50:02 10 THE LAWSUIT WAS FILED, BECAUSE THAT WAS 2014, SO THIS IS 2015.  
10:50:05 11 AND THEY ARE TELLING AT&T, YOU CAN COPY AND PASTE THE  
10:50:11 12 CONFIGURATIONS FROM THEIR EXISTING CISCO INFRASTRUCTURE ON TO  
10:50:17 13 AN ARISTA SWITCH AND 90 PERCENT PLUS OF COMMANDS WILL BE  
10:50:20 14 ACCEPTED.

10:50:20 15 SO EVEN AS OF 2015 WHEN THEY SAY IT WASN'T IMPORTANT  
10:50:23 16 ANYMORE, WE DIDN'T NEED TO DO IT, RIGHT, THAT'S WHAT I HEARD A  
10:50:27 17 FAIR AMOUNT OF DURING THIS CASE, THEY ARE STILL GIVING  
10:50:30 18 DOCUMENTS TO CISCO CUSTOMERS SAYING, HEY, COPY AND PASTE YOUR  
10:50:34 19 CONFIG, IT WILL RUN ON THE ARISTA SWITCH.

10:50:36 20 THAT'S NOT A TRIVIAL AMOUNT, RIGHT? AGAIN, I TOLD YOU AT  
10:50:42 21 THE BEGINNING OF THIS CASE, IT'S IMPORTANT TO LOOK AT WHAT  
10:50:44 22 PEOPLE SAY OUTSIDE OF COURT AND NOT SPEND SO MUCH TIME LOOKING  
10:50:49 23 AT WHAT THEY SAY INSIDE OF COURT.

10:50:54 24 SO WITH ALL OF THAT, I GET THROUGH -- THAT'S THE FIRST  
10:50:57 25 QUESTION, RIGHT? AND YOU WILL SEE THIS ON THE VERDICT FORM,

1 THE FIRST QUESTION IS, "HAS CISCO PROVEN THAT ARISTA INFRINGED  
2 ANY OF CISCO'S USER INTERFACE?" OKAY. WELL, THAT'S YES.

3 NOW I JUST WANT TO TALK BRIEFLY ABOUT THE USER MANUALS.

4 THERE'S NO QUESTION HERE, AND MS. ULLAL SAID, YEAH, WE  
5 DON'T TOLERATE PLAGIARISM. THEY WERE COPIED. AND THAT  
6 EMPLOYEE WAS TAKEN CARE OF, RIGHT?

7 SO THERE'S NOT ANY QUESTION THAT THEY WERE COPIED, THAT'S  
8 ADMITTED, ONCE AGAIN. SO HERE WE ARE NOT ASKING YOU, THE JURY,  
9 TO ASSESS DAMAGES FOR THAT INFRINGEMENT, JUST TO DETERMINE  
10 WHETHER THERE IS INFRINGEMENT BASED UPON THOSE ADMISSIONS.  
11 THAT'S SOMETHING THAT WE WILL DEAL WITH LATER, SO YOU DON'T  
12 NEED TO CONSIDER THAT, BUT YOU WILL HAVE QUESTION SIX THERE ON  
13 THE TECHNICAL MANUALS AS TO WHETHER OR NOT THERE WAS THAT  
14 INFRINGEMENT.

15 SO NOW LET ME MOVE TO CISCO'S DEFENSES -- ARISTA'S  
16 DEFENSES, I'M SORRY.

17 SO I'VE JUST TOLD YOU, AT LEAST WITH RESPECT TO THE  
18 COPYRIGHT STUFF, OUTLINED FOR YOU THE EVIDENCE FROM THE THINGS  
19 THAT ARE CISCO'S BURDEN TO PROVE, RIGHT?

20 NOW LET'S TALK ABOUT THE THINGS THAT ARE ARISTA'S BURDEN  
21 TO PROVE, MEANING THEY HAVE TO PROVE THESE THINGS TO YOU. AND  
22 THESE ARE REALLY EXCUSES, I THINK THERE'S MAYBE FIVE OF THEM  
23 YOU WILL SEE. AND BEFORE I GET INTO THOSE, THINK ABOUT THAT,  
24 RIGHT, FIVE.

25 WHAT USUALLY HAPPENS IN LIFE WHEN SOMEBODY COMES AND SAYS,



10:52:32 1 WELL, IT WASN'T MY FAULT, I DIDN'T DO IT, YOU KNOW, HE HIT ME  
10:52:38 2 FIRST, YOU KNOW, IT WAS AN ACCIDENT, RIGHT, THOSE KINDS OF  
10:52:44 3 THINGS.

10:52:44 4 I MEAN, USUALLY THEY ARE PROBABLY NOT TELLING YOU THE  
10:52:48 5 TRUTH, RIGHT? THAT'S USUALLY WHAT HAPPENS. AND THINK ABOUT  
10:52:51 6 THAT HERE, IF YOU HAVE ONE DEFENSE AND IT'S REALLY STRONG, WHY  
10:52:55 7 DO YOU NEED FIVE? WHY DON'T YOU SAY, WELL, IF YOU DON'T  
10:52:59 8 BELIEVE THAT, LET ME TELL YOU THIS ONE. SO THINK ABOUT THAT AS  
10:53:02 9 WE ARE GOING THROUGH THESE.

10:53:04 10 SO HERE, I WANT TO TALK ABOUT FAIR USE FIRST. AND YOU  
10:53:09 11 WILL SEE THIS INSTRUCTION, THIS IS AN IMPORTANT ONE TO GO BACK  
10:53:12 12 AND LOOK AT. THESE ARE FURTHER GUIDANCE ON WHAT THESE FAIR USE  
10:53:16 13 FACTORS, THE KINDS OF THINGS YOU ARE SUPPOSED TO CONSIDER.

10:53:19 14 AND THE IMPORTANT THING THAT I WANT YOU TO LOOK AT HERE  
10:53:22 15 WITH THIS FIRST ONE IS THAT COMMERCIAL USE WEIGHS AGAINST A  
10:53:25 16 FINDING OF FAIR USE.

10:53:27 17 AND THAT MAKES SENSE, RIGHT? IF I USE SOMEBODY'S  
10:53:31 18 COPYRIGHTED WORK IN ORDER TO BASICALLY DISPLACE THEM, TAKE AWAY  
10:53:34 19 THEIR OPPORTUNITIES IN THE MARKET, THAT'S PROBABLY NOT GOING TO  
10:53:37 20 BE FAIR USE; RIGHT. AND THAT JUST MAKES INTUITIVE SENSE, IT  
10:53:42 21 JUST SEEMS RIGHT.

10:53:43 22 WELL HERE, THERE'S NO QUESTION ABOUT THAT, DR. BLACK SAID  
10:53:45 23 THAT, FLAT OUT, ARISTA IS MAKING -- SO YOU AGREE THAT THE USE  
10:53:51 24 THAT ARISTA IS MAKING OF THE CISCO CLI IS COMMERCIAL, RIGHT? I  
10:53:55 25 THINK THAT'S CLEAR.

10:53:58 1 NO QUESTION ABOUT THAT. SO WE ARE YOU CAN THAT TALKING  
10:54:00 2 ABOUT A COMMERCIAL USE IN ORDER TO TARGET CISCO'S CUSTOMERS AND  
10:54:03 3 DISPLACE CISCO'S CUSTOMERS. SO THAT'S THE BACKDROP OF THIS.

10:54:07 4 NOW, THAT FIRST FACTOR ALSO TALKS ABOUT TRANSFORMATION,  
10:54:15 5 RIGHT? AND WE TALKED ABOUT THIS DURING THE CASE, BUT NOW YOU  
10:54:19 6 HAVE THE LAW ON THIS TRANSFORMATION. AND REMEMBER WHEN YOU ARE  
10:54:22 7 GOING BACK THERE, WHAT WE ARE TALKING ABOUT TRANSFORMING IS THE  
10:54:25 8 EXPRESSION, RIGHT? BECAUSE IN COPYRIGHT THAT'S WHAT YOU ARE  
10:54:28 9 TALKING ABOUT IS THE EXPRESSION, THAT'S THE PROTECTED WORK.

10:54:32 10 THERE ISN'T -- THERE'S NO TRANSFORMATION OF THE EXPRESSION  
10:54:35 11 HERE, THERE'S NO TRANSFORMATION OF THE CLI, THERE'S NO  
10:54:38 12 TRANSFORMATION OF THESE USER INTERFACES, THEY ARE USING IT IN  
10:54:42 13 EXACTLY THE SAME WAY.

10:54:44 14 IN FACT HERE, WHICH IS EXHIBIT 183 FROM MR. SWEENEY, AND  
10:54:49 15 WE SAW SOME OF HIS TESTIMONY ON VIDEO, HE DIDN'T COME TO  
10:54:52 16 TESTIFY LIVE, BUT YOU KNOW, IT ACTUALLY SAYS, WE USUALLY TRY  
10:54:55 17 HARD NOT TO INNOVATE ON CLI COMMANDS.

10:54:58 18 IN OTHER WORDS, WE INTENTIONALLY DON'T WANT TO CHANGE THE  
10:55:01 19 EXPRESSION, WE WANT TO KEEP IT THE SAME.

10:55:04 20 AND HERE AGAIN, WE SAW THIS FROM MS. ULLAL, THIS IS THE  
10:55:10 21 INTERVIEW REFERRING TO THE CISCO COMMAND-LINE INTERFACE, WE  
10:55:12 22 HAVE SIMILAR COMMAND-LINE INTERFACES AND OPERATIONAL LOOK AND  
10:55:16 23 FEEL WHERE WE DON'T HAVE TO INVENT, WE DON'T.

10:55:19 24 SO IN OTHER WORDS, WE LIKE IT, WE WANT TO BE THE SAME. WE  
10:55:21 25 ARE NOT GOING TO TRANSFORM IT. THAT'S WHAT WE ARE OUT THERE

1 SAYING. BUT HERE IN COURT WE ARE TELLING YOU, NO, OUR USE IS  
2 TRANSFORMATIVE.

3 AND I JUST WANT TO TOUCH ON THIS POINT A LITTLE BIT. SO  
4 WHEN DR. BLACK CAME UP, I BELIEVE HE WAS THE LAST WITNESS IN  
5 THE CASE RIGHT BEFORE I DONATED MY TIME TO THE JURY. AND  
6 DR. BLACK, ONE OF THE THINGS WE TALKED ABOUT WITH THIS  
7 TRANSFORMATION WAS WE HAVE THESE EAPI'S HE CALLED THEM, RIGHT?

8 AND I'M NOT GOING TO GO INTO DETAIL WHAT EXACTLY THAT WAS,  
9 BUT YOU WILL RECALL THAT WAS THIS THING WHERE HE SAID HE PUT A  
10 WRAPPER AROUND THE COMMANDS THEMSELVES SO YOU COULD ISSUE THE  
11 COMMANDS IN SOFTWARE, RIGHT? BUT YOU ARE STILL USING THE  
12 COMMANDS, NO QUESTION ABOUT IT, HE DID THAT.

13 SO THAT'S WHAT HE WAS TALKING ABOUT AS BEING ONE OF THE  
14 TRANSFORMATIONS, ONE OF THE MAIN THINGS.

15 BUT HERE, EXHIBIT 187, WE SHOWED THAT. I MEAN, THIS IS  
16 THE DOCUMENT WHERE IT SAID, KEN, REFERRING TO MR. DUDA, JUST  
17 BLATANTLY COPY CISCO'S API. AND THEN THERE WAS SOME QUESTION  
18 FROM DR. BLACK AS TO WHETHER THEY WERE TALKING ABOUT THE  
19 EAPI'S, BUT IF YOU GO TO THE TOP OF THE DOCUMENT, THAT'S WHAT  
20 MR. DUDA WAS REFERRING TO. SO "BLATANTLY COPY CISCO'S EAPIS,"  
21 YET HERE IN COURT, THAT'S ONE OF THE THINGS THAT THEY SAY IS  
22 TRANSFORMATIVE.

23 NOW WHAT WAS ONE OF THE OTHER THINGS THAT DR. BLACK TALKED  
24 ABOUT DURING THE END OF HIS TESTIMONY? WHICH IS THIS IDEA OF  
25 THE EXTENSIBLE PARSER, RIGHT? THE EXTENSIBLE PARSER.

10:56:58 1 AND DR. BLACK, YOU KNOW I ASKED HIM, WELL, DO YOU KNOW  
10:57:02 2 THAT'S ACCUSED OF INFRINGEMENT UNDER THE '526 PATENT -- AND I  
10:57:05 3 WILL TALK ABOUT THAT IN A MOMENT, BUT DR. BLACK SAID HE WASN'T  
10:57:10 4 AWARE, HE DIDN'T LOOK AT IT, HE DIDN'T KNOW.

10:57:13 5 SO HE'S OFFERING OPINIONS ON SOMETHING BEING  
10:57:17 6 TRANSFORMATIVE, SOMETHING BEING DIFFERENT WITHOUT ACTUALLY  
10:57:20 7 LOOKING AT THE CLAIMS IN THE CASE.

10:57:22 8 SO NOW LET'S TALK ABOUT THIS THIRD FACTOR FOR FAIR USE.  
10:57:29 9 AND THIS IS SIMILAR, YOU KNOW, VERY SIMILAR TO WHAT I WENT  
10:57:32 10 THROUGH, AND I'M NOT GOING TO GO BACK THROUGH ALL OF THAT  
10:57:34 11 EVIDENCE FOR WHETHER THE COPYING WAS TRIVIAL. IN OTHER WORDS,  
10:57:37 12 DID THEY TAKE A TRIVIAL AMOUNT.

10:57:40 13 THIS ONE, IN THIS IS -- TELLS YOU EXPLICITLY THAT WHEN YOU  
10:57:46 14 ARE EVALUATING IT, THAT EVEN A SMALL PART MAY BE QUALITATIVELY  
10:57:50 15 THE MOST IMPORTANT PART OF THE WORK.

10:57:52 16 AND SO YOU GOT TO CONSIDER BOTH THE QUANTITY AND THE  
10:57:55 17 QUALITY, RIGHT?

10:57:56 18 I ALREADY TALKED TO YOU ABOUT THE QUALITY AND WHAT THEY  
10:57:59 19 TOOK AND WHY THEY TOOK IT AND THAT THEY WERE TELLING CUSTOMERS,  
10:58:03 20 HEY, WE ARE THE SAME, RIGHT?

10:58:04 21 BUT WE KNOW FROM DR. BLACK THAT HE DIDN'T EVEN ADDRESS  
10:58:09 22 THAT. HE DIDN'T OFFER YOU AN OPINION SAYING NO, WHAT WAS TAKEN  
10:58:12 23 WAS QUALITATIVELY UNIMPORTANT, IT WAS OF NO QUALITY, NOBODY  
10:58:16 24 CARED ABOUT IT. HE NEVER OFFERED THAT OPINION. INSTEAD, HE  
10:58:19 25 SAID HE DIDN'T EVEN LOOK AT THAT.

10:58:23 1 DR. ALMEROOTH DID. HE TOLD YOU THAT. HE GAVE YOU  
10:58:26 2 TESTIMONY ABOUT THAT. HE TOLD YOU ABOUT THE QUALITY OF THAT  
10:58:29 3 WORK. SO YOU HEARD THAT FROM HIM. HE EVALUATED WHAT YOU ARE  
10:58:33 4 SUPPOSED TO DO, BUT DR. BLACK DID NOT, AND TOLD US THAT HE  
10:58:37 5 DIDN'T DO THAT.

10:58:39 6 WELL, LET'S TALK A LITTLE BIT ABOUT THIS IDEA OF QUANTITY,  
10:58:44 7 BECAUSE YOU'VE HEARD SOME NUMBERS TOSSED AROUND LIKE THERE MAY  
10:58:47 8 BE 18,000 COMMANDS OR SOMETIMES WE HEARD 16,000 COMMANDS IN  
10:58:52 9 IOS.

10:58:52 10 BUT REMEMBER WHAT WE HEARD AT THE BEGINNING, RIGHT? CISCO  
10:58:56 11 MAKES MANY, MANY PRODUCTS OUT THERE. ARISTA HAS ONLY ONE  
10:58:59 12 PRODUCT LINE. THAT'S ALL. AND ARISTA TOOK WHAT THEY NEEDED  
10:59:07 13 FOR THAT PRODUCT LINE.

10:59:10 14 AND WE KNOW HERE, THIS IS ANOTHER DOCUMENT, THIS IS,  
10:59:14 15 AGAIN, SOME TESTING THAT WAS DONE ON ARISTA PRODUCTS, AND THE  
10:59:18 16 CONCLUSION FROM THE TESTING, THIS IS AS OF 2009, EXHIBIT 278,  
10:59:23 17 THIS SYSTEM, IS A VERY CLOSE CLONE OF THE IOS CLI. THIS IS A  
10:59:29 18 MAJOR PLUS FOR THE MAJORITY OF CUSTOMERS WHO HAVE ALREADY  
10:59:32 19 CISCO-TRAINED STAFF.

10:59:35 20 SO AGAIN, ON THE ONE HAND THEY WANT TO COME IN AND TELL  
10:59:38 21 YOU WHAT WE TOOK WAS JUST A SMALL AMOUNT, WHAT WE TOOK WAS NOT  
10:59:42 22 IMPORTANT. BECAUSE THAT'S WHAT YOU ARE SUPPOSED TO BE  
10:59:44 23 EVALUATING. YET, IT'S LIKE THEY ARE TRYING TO ASK YOU TO GIVE  
10:59:49 24 THEM A PASS FOR TAKING WHAT THEY DIDN'T NEED, WHICH DOESN'T  
10:59:53 25 MAKE ANY SENSE.

10:59:54 1 WE'VE HEARD SOME OF THAT. YOU DON'T GET A PASS FOR TAKING  
10:59:57 2 WHAT YOU DON'T NEED, YOU GO OUT THERE, YOU TAKE WHAT YOU NEED  
11:00:00 3 SO YOU CAN SAY YOU ARE 100 PERCENT -- OR EXCUSE ME, I MISSPOKE.  
11:00:06 4 99.999 PERCENT SAME AND A DROP-IN REPLACEMENT, YET YOU COME  
11:00:11 5 INTO COURT AND SAY NO, WE DIDN'T TAKE VERY MUCH.

11:00:15 6 SO LET'S TALK ABOUT THIS FOURTH FAIR USE FACTOR THAT YOU  
11:00:18 7 ARE GOING TO EVALUATE. AND ONE OF THE THINGS THAT THIS SAYS,  
11:00:23 8 THIS IS INSTRUCTION 56, FACTOR CONSIDERS WHETHER THE ACCUSED  
11:00:28 9 WORK IS OFFERED OR USED AS A SUBSTITUTE FOR THE ORIGINAL  
11:00:32 10 COPYRIGHTED WORK.

11:00:33 11 SO LET'S TALK ABOUT THAT FIRST. IT SURE WAS, RIGHT?  
11:00:37 12 EXHIBIT 171. YOU ARE TELLING PEOPLE IT'S A 99.99 PERCENT  
11:00:42 13 DROP-IN REPLACEMENT, THAT'S ABOUT AS MUCH AS A SUBSTITUTE FOR  
11:00:47 14 THE WORK AS YOU CAN GET. SO THERE'S NO QUESTION ABOUT THAT.

11:00:51 15 NOW WHAT WE MOVE INTO IS THIS OTHER THING. BECAUSE THE  
11:00:54 16 WAY I HEARD IT ANYWAY, AND I MIGHT BE WRONG, AND YOU ARE GOING  
11:00:56 17 TO HEAR FROM ARISTA'S COUNSEL, BUT THE WAY I HEARD IS, YEAH,  
11:00:59 18 BUT THERE'S NO HARM TO CISCO, RIGHT? THERE'S NO HARM OUT THERE  
11:01:04 19 FOR US USING IT BECAUSE THERE WAS WIDESPREAD USE OF THIS USER  
11:01:08 20 INTERFACE BY OTHERS.

11:01:10 21 BUT AGAIN, THEY HIRED DR. BLACK TO DO THAT. AND SET  
11:01:14 22 ASIDE -- I THINK THERE WAS ENOUGH TESTIMONY THAT WE WENT  
11:01:18 23 THROUGH ABOUT HIS METHODOLOGY IN TERMS OF HOW HE SELECTED HIS  
11:01:23 24 GROUP. SO WE WILL PUT THAT ASIDE. BUT HE EVEN SAID  
11:01:28 25 EXPLICITLY, HE WASN'T OFFERING ANY OPINION ON WHETHER THERE WAS

11:01:31 1 WIDESPREAD USE, RIGHT? NOT ONE OPINION AT ALL. HE COULDN'T  
11:01:36 2 TELL YOU WHERE THE LINE WAS, EVEN BASED UPON HIS OWN DATA, AND  
11:01:41 3 REFUSED TO TELL HIM WHERE THE LINE WAS.

11:01:43 4 IN FACT, I ASKED HIM, IF I KEPT GOING, YOU WOULDN'T TELL  
11:01:47 5 ME? NO, I COULDN'T HELP YOU THERE.

11:01:50 6 BUT WHAT DO WE KNOW? I MEAN, WE WENT THROUGH AND I DID MY  
11:01:55 7 RUDIMENTARY MATH, PERHAPS NOT EXACTLY RIGHT, BUT I DID THE BEST  
11:01:58 8 I COULD AT THE TIME, BUT WE GOT UP TO 281, AND HE STILL SAID I  
11:02:02 9 HAVE NO OPINION.

11:02:02 10 SO IN OTHER WORDS, THAT'S WELL OVER HALF OF THE COMMANDS  
11:02:05 11 WE ARE TALKING ABOUT THAT ARE AT ISSUE IN THIS CASE. AND  
11:02:07 12 DR. BLACK'S OWN HAND-SELECTED DATA SAID MOST OF PEOPLE OUT  
11:02:11 13 THERE THAT HE LOOKED AT AREN'T USING THOSE THINGS.

11:02:16 14 AND THIS, I WANT TO PAUSE HERE FOR A MINUTE.  
11:02:21 15 EXHIBIT 6095, I WANT YOU TO TAKE A LOOK AT THIS ONE. IT WASN'T  
11:02:24 16 TALKED ABOUT A LOT IN THE CASE, I PUT THIS IN EVIDENCE WITH  
11:02:28 17 MR. HOLBROOK WHEN HE WAS ON THE STAND.

11:02:31 18 THIS IS AN ARISTA DOCUMENT THAT SUMMARIZES THIS 2010  
11:02:34 19 NETWORK WORLD TEST THAT LOOKED AT SOME SWITCHES THAT ARE OUT  
11:02:38 20 THERE. SO THIS IS A THIRD PARTY TEST, BUT THIS IS AN ARISTA  
11:02:41 21 DOCUMENT THAT SUMMARIZES IT.

11:02:43 22 SO REMEMBER SOME OF THE THINGS WE HEARD, RIGHT, WE HEARD  
11:02:46 23 FROM ARISTA THAT ONE OF THEIR EXCUSES IS, I PUT THIS IN BECAUSE  
11:02:50 24 EVERYBODY ELSE WAS OUT THERE DOING IT. IN OTHER WORDS, I USED  
11:02:53 25 THE CISCO USER INTERFACE BECAUSE EVERYBODY ELSE WAS OUT THERE

11:02:56 1 DOING IT.

11:02:56 2 WELL, WE KNOW FROM THE TESTIMONY THEY NEVER LOOKED, RIGHT?  
11:03:00 3 WE ASKED THEM, DID YOU EVER DO A STUDY BEFORE YOU DID IT? DID  
11:03:03 4 YOU EVER LOOK AS TO WHAT OTHER PEOPLE WERE DOING? THEY SAID  
11:03:07 5 NO, WE NEVER DID ANYTHING LIKE THAT.

11:03:09 6 BUT WHAT DO WE SEE IN 2010? THIS IS THEIR OWN INTERNAL  
11:03:13 7 DOCUMENTS HERE. HP, THAT'S ONE THEY TOLD YOU, HP WAS OUT THERE  
11:03:16 8 USING THIS. WELL, THEY SAY THAT THEIR SWITCH IS IOS, RIGHT?  
11:03:22 9 USES THE CLI. BUT HP, THEIR OWN INTERNAL DOCUMENT IS SAYING  
11:03:25 10 IT'S NOT CONSISTENT, RIGHT, IT'S NOT CONSISTENT. IN OTHER  
11:03:28 11 WORDS, IT'S DIFFERENT FROM IOS.

11:03:31 12 SAME WITH RESPECT TO EXTREME, ANOTHER ONE THAT THEY TELL  
11:03:35 13 YOU AND THEY RELY UPON. EXTREME, THEY WERE DOING THIS, THEY  
11:03:38 14 WERE USING THE CISCO IOS. WELL, THEY WEREN'T. THAT'S WHAT  
11:03:42 15 THEY SAY. THEIR OWN INTERNAL DOCUMENTS SAY THAT THEY WEREN'T  
11:03:46 16 USING IT.

11:03:47 17 AND AGAIN, HERE WITH DELL, WE'VE HEARD A LOT ABOUT DELL,  
11:03:50 18 BUT WHAT DO THEY SAY? WE ARE IOS. BUT DELL IS NOT.

11:03:54 19 SO ON THE ONE HAND, THEY ARE TRYING TO TELL YOU WE USE  
11:03:57 20 THIS STUFF BECAUSE EVERYBODY ELSE WAS USING IT, WHEN THEIR OWN  
11:04:01 21 INTERNAL DOCUMENTS ARE SAYING NO, IT'S A SELLING POINT THAT WE  
11:04:05 22 WERE DIFFERENT, WE'RE THE MOST BLATANT VIOLATOR.

11:04:11 23 SO NOW LET ME TALK ABOUT THESE OTHER COUPLE OF DEFENSES.  
11:04:17 24 THESE ARE MERGER AND SCÈNES À FAIRE.

11:04:22 25 SO MERGER, RIGHT, THAT ONE IS -- HAD ONLY ONE WAY OR VERY



1 FEW WAYS TO EXPRESS THE IDEA. NOW THESE TWO DEFENSES ARE  
2 REALLY THE FLIP SIDE OF ORIGINALITY AND CREATIVITY THAT WE  
3 HEARD TALKED ABOUT, SO I'M NOT GOING TO GO BACK THROUGH ALL OF  
4 THAT EVIDENCE.

5 BUT YOU KNOW FROM WHAT I WENT THROUGH THAT THERE WERE MANY  
6 DIFFERENT WAYS TO EXPRESS THESE THINGS AND WE SAW SOME OF THOSE  
7 EXAMPLES AND WE HEARD THAT TESTIMONY, RIGHT?

8 AND THEN WITH RESPECT TO SCÈNES À FAIRE, THE QUESTION IS  
9 DID EXTERNAL FACTORS OTHER THAN CISCO'S CREATIVITY DICTATE WHAT  
10 CISCO DID WITH THE USER INTERFACE.

11 AND WE SAW THE EVIDENCE THAT WASN'T THE CASE EITHER;  
12 RIGHT. AND WE KNOW FROM MR. SHAFER, HE SET OUT TO DESIGN A  
13 USER INTERFACE THAT HE SAID HE WANTED TO BE SLAVISHLY DIFFERENT  
14 FROM CISCO'S USER INTERFACE. AND SAID THAT HE HAD A GREEN  
15 FIELD AND HE COULD DO WHATEVER HE WANTED, RIGHT?

16 HE'S TRYING TO EXPRESS TO CUSTOMERS OUT THERE THAT SAME  
17 SET OF CORE FUNCTIONS. IN OTHER WORDS, SOMETHING THAT THEY  
18 COULD ACCESS AND THEY KNOW THAT. BUT HE'S SAYING THAT THEY DID  
19 IT TOTALLY DIFFERENTLY. WE HEARD THE GENTLEMAN FROM HP TELL US  
20 EXACTLY THE SAME THING AND WE SAW EXAMPLES OF THAT.

21 FRANKLY, DR. BLACK'S OWN DATA, IF YOU THINK ABOUT IT,  
22 TELLS US EXACTLY THE SAME THING, RIGHT? BECAUSE IF YOU TAKE  
23 THE 506 COMMANDS THAT ARE AT ISSUE HERE AND YOU SHOW THE VAST  
24 MAJORITY OF THE HAND-PICKED GROUP THAT HE WAS LOOKING AT DID  
25 SOMETHING DIFFERENT, YOU DIDN'T HEAR ANY TESTIMONY THAT SAID

11:05:51 1 WELL, THOSE CORE FEATURES WEREN'T HERE, WE DIDN'T HAVE THE CORE  
11:05:54 2 FEATURES AND FUNCTIONS.

11:05:55 3 SO WE KNOW THAT THERE ARE MANY DIFFERENT WAYS TO EXPRESS  
11:05:59 4 THESE, NOT ONLY IN THEORY, BUT IN PRACTICE. THAT'S THE WAY IT  
11:06:02 5 HAPPENED.

11:06:05 6 SO THEN HERE WE GET TO QUESTION TWO, THESE ARE ARISTA'S  
11:06:11 7 BURDEN OF PROOF, AS I SAY, AND THE IMPORTANT THING THAT I WANT  
11:06:14 8 TO NOTE HERE IS, AS I SAID, ANY OF THESE DEFENSES, I'M GOING TO  
11:06:18 9 TALK ABOUT A COUPLE MORE BECAUSE I SAID THERE WAS FIVE, ARE  
11:06:21 10 THOSE ARE DECISIONS FOR ARISTA.

11:06:23 11 SO DON'T THINK THAT IF I SAY, WELL, IT'S NOT FAIR USE, BUT  
11:06:27 12 IT'S SCÈNES À FAIRE, THEN THAT'S KIND OF SPLITTING THE BABY,  
11:06:31 13 AND THAT'S NOT THE WAY IT WORKS. ANY ONE OF THESE WOULD BE, AS  
11:06:36 14 HER HONOR SAID, WOULD BE A DECISION FOR ARISTA.

11:06:40 15 NOW LET'S TALK A LITTLE BIT ABOUT THE HUAWEI CASE. WE  
11:06:43 16 HEARD A FAIR AMOUNT ABOUT THIS. AND HUAWEI IS IMPORTANT HERE,  
11:06:48 17 THE REASON WHY IT CAME UP, BECAUSE HUAWEI IS, THEY WERE THE  
11:06:53 18 OTHER BLATANT VIOLATOR, THAT HAPPENED BEFORE AND THAT'S WHAT  
11:06:56 19 CISCO PURSUED.

11:07:00 20 SO WE HEARD FROM MR. GIANCARLO, AND HE WAS UP ON THE  
11:07:03 21 STAND, INITIALLY, THIS WAS EXHIBIT 250 IT'S IN EVIDENCE, WAS  
11:07:06 22 HIS SWORN DECLARATION UNDER PENALTY OF PERJURY, IF YOU WILL  
11:07:09 23 RECALL.

11:07:09 24 AND IN THAT DECLARATION, HE SAYS, CISCO'S PROPRIETARY IOS  
11:07:14 25 IS ONE OF THE COMPANY'S MOST VALUABLE ASSETS. THE SAME HOLDS

11:07:17 1 TRUE FOR THE CISCO USER INTERFACE.

11:07:20 2 THIS INTERFACE, WHICH IS UNIQUE TO CISCO, HAS BEEN  
11:07:23 3 DEVELOPED OVER MANY YEARS THROUGH THE EXPENDITURE BY CISCO OF  
11:07:26 4 HUNDREDS OF MILLIONS OF DOLLARS; RIGHT.

11:07:30 5 THIS CASE WAS ABOUT THE CLI. SURE. IT WAS ALSO ABOUT  
11:07:34 6 SOURCE CODE COPYING AS WELL, NOBODY HAS EVER DENIED THAT. BUT  
11:07:37 7 FOR FOR US T COME HERE AND SUGGEST AND TRY TO GET MR. GIANCARLO  
11:07:42 8 TO TESTIFY THAT IT WASN'T ABOUT CLI IN LIGHT OF THE DECLARATION  
11:07:46 9 THAT HE PUT IN, ISN'T CREDIBLE; RIGHT. AND WE KNOW WHAT THE  
11:07:51 10 COMPLAINT SAID, I SHOWED YOU THOSE THINGS.

11:07:54 11 WHAT ELSE DO WE KNOW? WELL, WE KNOW WHAT DR. BLACK SAID,  
11:07:58 12 RIGHT? DR. BLACK LOOKED AT THIS, HE SPENT A THOUSAND HOURS ON  
11:08:03 13 THE CASE, THIS IS THEIR EXPERT, AND I ASKED HIM:

11:08:05 14 "ARE YOU AWARE THAT IN 2003 CISCO FILED A LAWSUIT AGAINST  
11:08:09 15 HUAWEI WHERE, AMONG THE CLAIMS WAS, YOU COPIED OUR CLI?"

11:08:13 16 HIS ANSWER, "I BELIEVE THAT'S TRUE."

11:08:14 17 AND IN FACT, HE HAVE IN HIS VERY EXPERT REPORT THAT ARISTA  
11:08:18 18 PUT TOGETHER IN THIS CASE, THAT AT ISSUE IN THE HUAWEI CASE  
11:08:21 19 WERE 488 CLI COMMANDS, RIGHT? 488. THAT'S LESS THAN WHAT'S AT  
11:08:27 20 ISSUE IN THE CASE, BUT IT'S STILL A HECK OF A LOT.

11:08:31 21 WHAT DID HE SAY ABOUT THE SOURCE CODE? WE HEARD -- I  
11:08:34 22 THINK YOU HEARD IN OPENING STATEMENT FROM ARISTA'S COUNSEL,  
11:08:37 23 THIS CASE WAS ABOUT WHOLESALE COPYING, THEY TOOK ALL OF THE  
11:08:42 24 SOURCE CODE, AT LEAST THAT'S WHAT I HEARD.

11:08:45 25 IT WAS ABOUT 29,000 LINES OF CODE. THAT'S WHAT DR. BLACK

11:08:48 1 SAID, RIGHT? OUT OF HOW MANY, I ASKED HIM, RIGHT? AND  
11:08:51 2 THERE'S, I THINK YOU SAID SEVERAL MILLION IN IOS. "IT DEPENDS  
11:08:55 3 ON WHICH PRODUCT WE ARE TALKING ABOUT, BUT IT'S A LOT MORE THAN  
11:08:59 4 THAT."

11:08:59 5 SO IN OTHER WORDS, DR. BLACK SAYS IT'S A LOT MORE THAN  
11:09:03 6 SEVERAL MILLION LINES OF CODE IN IOS, AND THE CASE WAS ABOUT  
11:09:06 7 29,000 LINES OF SOURCE CODE. YET HERE THEY WANT TO TELL YOU  
11:09:09 8 THAT CASE WAS ALL ABOUT SOURCE CODE, DIDN'T HAVE ANYTHING TO DO  
11:09:11 9 WITH THE CLI, DESPITE WHAT DR. BLACK SAID.

11:09:18 10 IN THE PRESS RELEASES, YOU WILL SEE SOME OF THESE IN  
11:09:22 11 EXHIBIT 4424 AND 4673, THEY TALKED ABOUT THAT, YOU KNOW, THAT  
11:09:26 12 THE COMMAND-LINE INTERFACE WAS AT ISSUE IN THIS. AND WE HEARD  
11:09:29 13 MANY, MANY TIMES OF THE SETTLEMENT, HUAWEI AGREED TO CHANGE THE  
11:09:34 14 COMMAND-LINE INTERFACE. SO OF COURSE THAT'S WHAT THAT CASE WAS  
11:09:36 15 ABOUT. AND OF COURSE THAT WAS, AS I SAID, THE FIRST TIME THERE  
11:09:42 16 WAS A BLATANT VIOLATOR HERE.

11:09:45 17 SO NOW WE GET TO TWO MORE DEFENSES, AND THAT WOULD BE  
11:09:47 18 ABANDONMENT. IN OTHER WORDS, CISCO DOESN'T CARE ABOUT ITS  
11:09:51 19 COPYRIGHT AND DOESN'T DO IT.

11:09:54 20 WELL, YOU'VE SEEN THE INSTRUCTION AND YOU CAN GO BACK AND  
11:09:56 21 LOOK AT THAT ABOUT WHAT'S REQUIRED. FIRST BLATANT VIOLATOR,  
11:09:59 22 CISCO PURSUED. NOW IT'S THE SECOND BLATANT VIOLATOR. THAT'S  
11:10:04 23 NOT ABANDONMENT.

11:10:06 24 SAME WITH RESPECT TO COPYRIGHT MISUSE. IT'S EXACTLY THE  
11:10:09 25 SAME ISSUE. AND AGAIN, THERE'S NO EVIDENCE OF THAT IN THE

11:10:11 1 CASE.

11:10:12 2 DR. BLACK TOLD US THAT AT THE BEGINNING. IT MAKES SENSE.  
11:10:15 3 YOU CAN'T GO AFTER EVERYBODY WITH THESE THINGS. AND THE OTHER  
11:10:18 4 THING, WHAT DID WE SEE OVER AND OVER AGAIN? THE EVIDENCE HERE,  
11:10:23 5 ARISTA HAS BEEN OUT THERE TELLING THEIR CUSTOMERS THEY ARE A  
11:10:26 6 DROP-IN REPLACEMENT. WE ARE CISCO. WE ARE THE SAME. COPY AND  
11:10:32 7 PASTE YOUR CONFIGURATION FILES, ALL OF THOSE KINDS OF THINGS.

11:10:35 8 YOU DIDN'T SEE ONE PIECE OF EVIDENCE FROM ANYONE, AND WE  
11:10:37 9 HAD THIRD PARTIES COME IN, THAT ANY OTHER COMPANY OUT THERE HAS  
11:10:41 10 EVER MADE THOSE CLAIMS. NO ONE HAS EVER SAID WE ARE THE SAME,  
11:10:46 11 WE ARE A DROP-IN REPLACEMENT.

11:10:48 12 SO NOW LET ME TURN TO THE UNIFIED INTERFACE PATENT. AND  
11:10:54 13 HERE THE UNIFIED INTERFACE PATENT, THAT'S THE '526 PATENT.  
11:10:58 14 HERE THE FUNCTIONALITY THAT WE ARE TALKING ABOUT IS IN THE  
11:11:00 15 PARSER CODE, RIGHT, IT'S IN THE SOURCE CODE.

11:11:06 16 AND WHAT WAS THE PROBLEM, AND DR. JEFFAY TALKED ABOUT THIS  
11:11:11 17 A BIT AND WE SAW SOME OF THE TESTIMONY AT LEAST ON VIDEOTAPE  
11:11:15 18 FROM MR. WHEELER. BASICALLY, IT WAS THIS IDEA THAT YOU MIGHT  
11:11:19 19 HAVE A NUMBER OF TOOLS AND THINGS THAT YOU CAN USE IN YOUR  
11:11:22 20 PRODUCT, RIGHT, THAT CAN BE ADDED TO THE OPERATING SYSTEM. AND  
11:11:26 21 THOSE PEOPLE THAT MAKE THE TOOLS, THEY MIGHT USE DIFFERENT  
11:11:29 22 COMMANDS. AND WE KNOW WHY BECAUSE DIFFERENT ENGINEERS MAKE  
11:11:32 23 DIFFERENT CHOICES, AS TO THE COMMANDS THAT MIGHT BE THE SAME  
11:11:36 24 FUNCTIONALITY.

11:11:37 25 SO WHAT DO THEY DO? THEY PROVIDED THIS UNIFIED INTERFACE

11:11:41 1 TO DO THAT TRANSLATION SO THAT THE CUSTOMER THAT'S USING IT  
11:11:45 2 COULD JUST HAVE ONE INTERFACE AND STILL BE ABLE TO ACCESS THE  
11:11:48 3 FUNCTIONALITY PROVIDED BY THOSE OTHER TOOLS THAT MIGHT USE  
11:11:52 4 DIFFERENT TYPES OF COMMAND STRUCTURE, DIFFERENT LANGUAGE,  
11:11:56 5 ESSENTIALLY.

11:11:57 6 WELL, AND HERE, THIS IS AN APPENDIX TO THE PATENT, YOU CAN  
11:12:01 7 SEE IF YOU WANT TO TAKE A LOOK, JUST SOME OF THE EXAMPLES OF  
11:12:04 8 THE DIFFERENT KIND OF COMMANDS THAT ARE USED FOR THE SAME BASIC  
11:12:08 9 FUNCTIONALITY BETWEEN THESE VARIOUS THINGS. THIS WOULD BE  
11:12:11 10 EXHIBIT 95 IN THE PATENT.

11:12:13 11 NOW, HERE WHAT IS ACCUSED OF INFRINGEMENT IS THIS, WHAT  
11:12:18 12 ARISTA CALLS ITS EXTENSIBLE PARSER, WHICH USES THE COMBINATION  
11:12:22 13 OF THIS CLI AND THIS SYSDB DATABASE TO SPEAK TO ALL OF THESE,  
11:12:26 14 WHAT THEY CALL AGENTS, RIGHT, THAT ARE MANAGEMENT PROGRAMS  
11:12:28 15 UNDER THE COURT'S CONSTRUCTION.

11:12:30 16 YOU HEARD THIS FROM DR. JEFFAY. NOW HERE'S THE MAIN POINT  
11:12:36 17 THAT I WANT TO ADDRESS HERE. WHAT DR. CHASE, THAT'S WHAT  
11:12:42 18 ARISTA'S EXPERT SAID, THAT HIS DUTY OR WHAT HE SET OUT TO DO IN  
11:12:46 19 THIS CASE, WHAT HE WAS ASKED TO DO WAS TO RESPOND TO THE  
11:12:49 20 ALLEGATIONS THAT DR. JEFFAY MADE, THAT'S WHAT HE TOLD US.

11:12:52 21 BUT IMPORTANTLY, WHAT DR. JEFFAY SAID WAS THE INFRINGING  
11:12:56 22 FUNCTIONALITY, RIGHT, WAS THIS CONTEXT.STATE, RIGHT? IN OTHER  
11:13:01 23 WORDS THIS SCOREBOARD, THE WAY HE DESCRIBED IT THAT WAS UPDATED  
11:13:06 24 AS THE COMMAND WAS PARSED.

11:13:08 25 WELL, DR. CHASE TOLD US EXPLICITLY:

11:13:14 1 Q. YOU DIDN'T MENTION IN YOUR TESTIMONY THAT CONTEXT.STATE  
11:13:18 2 VARIABLE THAT DR. JEFFAY TALKED ABOUT, DID YOU?

11:13:20 3 A. NO.

11:13:21 4 Q. SO YOU DIDN'T PRESENT ANY TESTIMONY ABOUT WHAT THE  
11:13:24 5 VARIABLE COMPRISES, RIGHT?

11:13:25 6 A. NO.

11:13:27 7 SO IN OTHER WORDS, HE DIDN'T EVEN TALK ABOUT IT. HE SAID  
11:13:30 8 HE WAS THERE TO RESPOND TO DR. JEFFAY'S ALLEGATIONS, BUT HE  
11:13:32 9 DIDN'T RESPOND TO THE MAIN INFRINGEMENT ALLEGATION IN THE CASE  
11:13:35 10 AND HE TOLD US THAT HE DIDN'T RESPOND TO THAT.

11:13:37 11 SO HE DIDN'T DO WHAT HE WAS GOING TO TELL YOU THAT HE DID.  
11:13:41 12 SO DR. JEFFAY, NOBODY REBUTTED DR. JEFFAY'S TESTIMONY IN THIS  
11:13:45 13 CASE, THEY JUST IGNORED IT.

11:13:47 14 AND WHAT DID THEY DO INSTEAD? WHAT THEY DID INSTEAD, AS  
11:13:53 15 YOU WILL RECALL, IS COMPARE TO SOME OF THE EXAMPLES IN THE  
11:13:56 16 PATENT AND SAY WELL, THE BEHAVIOR HERE IS DIFFERENT THAN WHAT  
11:13:59 17 WE HAD IN OUR PRODUCT IN THE EOS, THEREFORE IT MUST NOT  
11:14:02 18 INFRINGE.

11:14:02 19 WELL, THAT'S JUST WRONG AS A MATTER OF LAW; RIGHT. SET  
11:14:06 20 ASIDE THE FACT THAT DR. JEFFAY EXPLAINED HOW THE BEHAVIOR IS  
11:14:10 21 ACTUALLY CONSISTENT, BUT BEYOND THAT IT'S WRONG. THAT'S NOT  
11:14:13 22 WHAT YOU DO. YOU DON'T LOOK AND COMPARE PRODUCTS TO EXAMPLES  
11:14:16 23 THAT ARE IN THE PATENT. YOU LOOK AT THE CLAIMS OF THE PATENT.  
11:14:19 24 NOT TO EXAMPLES OF THE PATENT. AND THAT NEVER HAPPENED.

11:14:25 25 SO HERE ON THE PATENT INFRINGEMENT, WE HAVE CLAIMS 1 AND

11:14:30 1 14. CLAIM 1 WAS THE METHOD CLAIM AND CLAIM 14 IS THE PRODUCT  
11:14:37 2 CLAIM. SO CLAIM 14, THAT'S THE DIRECT INFRINGEMENT CLAIM.  
11:14:41 3 CLAIM 1 WOULD BE THE OTHER TWO I'M GOING TO TALK ABOUT,  
11:14:44 4 INDUCEMENT AND CONTRIBUTORY INFRINGEMENT, THAT THE LAWYERS CALL  
11:14:48 5 INDIRECT INFRINGEMENT, AND YOU HAVE INSTRUCTIONS ON THOSE.

11:14:50 6 SO FOR CLAIM 14, THAT'S REALLY WHAT YOU NEED TO CONSIDER,  
11:14:53 7 WAS THERE DIRECT INFRINGEMENT IN THE CASE? AND THEN THAT'S  
11:14:56 8 YES.

11:14:57 9 NOW CLAIM 1 AND 14 WE HAVE THE INDUCED AND CONTRIBUTORY  
11:15:02 10 INFRINGEMENT.

11:15:04 11 WITHOUT GOING INTO DETAIL, BECAUSE YOU WILL HAVE THOSE  
11:15:07 12 INSTRUCTIONS WHEN YOU GO BACK THERE, THOSE ARE BASICALLY  
11:15:09 13 THINGS -- DID YOU INDUCE YOUR CUSTOMERS TO INFRINGE? RIGHT.  
11:15:13 14 DID YOU TELL THEM TO PERFORM THAT INFRINGING FUNCTIONALITY  
11:15:17 15 AFTER YOU KNEW ABOUT THE PATENT?

11:15:18 16 SO THAT EVIDENCE WE HAVE. THAT WE PUT IN, RIGHT, AND  
11:15:23 17 DR. CHASE DIDN'T GET UP THERE AND SAY NO, I DISAGREE WITH THAT,  
11:15:27 18 RIGHT, HE DIDN'T ADDRESS THOSE THINGS.

11:15:34 19 SO NOW LET ME TALK A BIT ABOUT THE DAMAGES HERE. AND WE  
11:15:42 20 HEARD ABOUT THOSE AT THE END FROM DR. CHEVALIER AND MS. ELSTEN.

11:15:51 21 AND OF COURSE, IT SHOULD BE NO SURPRISE IN THIS CASE THAT  
11:15:54 22 THERE'S A DIFFERENCE OF OPINION ABOUT THOSE THINGS, THERE'S A  
11:15:57 23 DIFFERENCE OF OPINION ABOUT MANY THINGS IN THIS CASE, WHICH IS  
11:16:00 24 NOT UNKNOWN.

11:16:03 25 HERE, AND THIS IS EXHIBIT 237, THIS IS AN IMPORTANT THING



11:16:06 1 TO KEEP IN MIND. THIS IS A DOCUMENT WHERE WHAT ARISTA IS DOING  
11:16:15 2 IS TELLING ITS SALES ENGINEERS, YOU KNOW, THE PEOPLE THAT ARE  
11:16:18 3 GOING OUT THERE AND INTERFACING CUSTOMERS, WHAT DO YOU DO IF A  
11:16:23 4 CUSTOMER TELLS YOU, WELL, WE ARE A CISCO SHOP. YOU SAY, THAT'S  
11:16:27 5 GREAT, ALMOST 100 PERCENT OF OUR CUSTOMER BASE IS COMPRISED OF  
11:16:31 6 LARGE CISCO SHOPS.

11:16:34 7 SO AS MR. SADANA SAID, WHAT THEY ARE OUT THERE DOING IS  
11:16:38 8 TARGETING THE CISCO CUSTOMERS. AND THEN WHAT DID HE SAY? OUR  
11:16:44 9 PRODUCTS ARE COMPATIBLE IN CISCO IN A NONPROPRIETARY MANNER AND  
11:16:49 10 OUR CLI IS CISCO-LIKE AND WILL NOT REQUIRE ANY TRAINING ON YOUR  
11:16:53 11 PART.

11:16:53 12 IN OTHER WORDS, YOU KNOW CISCO, YOU KNOW US, YOU DON'T  
11:16:56 13 NEED TO TRAIN ANYBODY, WE WON'T TRAIN ANYBODY, YOU CAN USE  
11:17:00 14 THIS.

11:17:00 15 SO THAT'S WHAT WAS TARGETED. AND THE CLI, THE USER  
11:17:05 16 INTERFACE THAT'S AT ISSUE IN THIS CASE, WAS TAKEN FOR THAT  
11:17:07 17 PURPOSE, SO THEY COULD TELL PEOPLE THAT, THAT WAS ITS PURPOSE  
11:17:11 18 IN LIFE. AND HERE FROM MR. SADANA, YOU HAVE THIS, THAT THAT  
11:17:15 19 CLI WAS A CHECK MARK, YOU NEEDED IT TO GET TO THE NEXT STAGE.

11:17:20 20 NOW YOU HEARD A BUNCH OF TESTIMONY FROM MS. ELSTEN SAYING  
11:17:23 21 WELL, I DON'T THINK CUSTOMERS REALLY DEMANDED THAT AS A  
11:17:27 22 FEATURE, REALLY SAID THAT'S A REASON FOR BUYING IT. BUT  
11:17:32 23 DR. CHEVALIER EXPLAINED THAT DOESN'T MAKE ANY SENSE. AND  
11:17:35 24 MR. SADANA'S TESTIMONY IS 100 PERCENT CONSISTENT WITH THAT.

11:17:38 25 SO IN OTHER WORDS, IF THEY'RE THE SAME, BOTH PRODUCTS ARE

1 THE SAME, YOU CAN CHECK IT OFF, YOU CAN GET TO THE NEXT STAGE,  
2 YOU CAN GET YOUR FOOT IN THE DOOR AND THEY WILL CONSIDER WHAT  
3 ELSE YOU HAVE THERE. BUT IF YOU DON'T, YOU CAN'T GET THAT.

4 AND THAT'S THE TESTIMONY WE HEARD AND THAT'S WHY THEY  
5 INFRINGE THE COPYRIGHTS.

6 SO TO COME IN AND SUGGEST THAT BECAUSE I DON'T SEE A WHOLE  
7 BUNCH OF DOCUMENTS WHERE CUSTOMERS ARE SAYING YEAH, I BOUGHT IT  
8 BECAUSE OF THE CLI, DOESN'T MAKE ANY SENSE BECAUSE THEY ARE  
9 TELLING PEOPLE OUR USER INTERFACE IS THE SAME AS CISCO'S. SO  
10 IT'S NOT A WAY TO DISTINGUISH ONE FROM ANOTHER, BUT IT IS A WAY  
11 TO GET IN THE DOOR.

12 AND HERE AGAIN, EXHIBIT 197, THEY TOLD US WHY THEY DID  
13 THAT BECAUSE WE JUST WANT TO LEVERAGE ALL THE PARTNER TRAINING  
14 THAT CISCO DOES.

15 AND MR. SADANA DIDN'T DENY THAT. IN FACT, WHEN HE WAS ON  
16 THE STAND I ASKED HIM ABOUT THAT AND HE SAID THAT'S EXACTLY  
17 RIGHT. THAT'S WHY WE PICKED CISCO BECAUSE WE PREFER THEIR  
18 CUSTOMERS TO SOME OF THE OTHERS, LIKE JUNIPER.

19 NOW ANOTHER PART OF THIS IS -- A BIG PART OF MS. ELSTEN'S  
20 RESPONSE ON THE LOST PROFITS IS -- AND CUSTOMERS LIKE MICROSOFT  
21 AND FACEBOOK DIDN'T REALLY WANT IT, RIGHT? THEY DIDN'T WANT  
22 IT.

23 WELL, I'VE ALREADY SHOWN YOU THE DOCUMENTS THAT EVEN AFTER  
24 ARISTA WENT IN TO THAT MARKET, THEY ARE STILL ADDING MORE AND  
25 MORE COMMANDS AS THEY ADD THE CORE FUNCTIONALITY TO THE SWITCH.

1 BUT HERE WE SEE IN 648 THAT AS OF 2011, AS OF 2011, ON  
2 MICROSOFT AND FACEBOOK'S WISH LIST, THEY HAVE SPECIFIC  
3 INFRINGING CLI COMMANDS THAT ARE AT ISSUE IN THIS CASE.

4 SO THEY ARE ASKING FOR THIS. AND IN FACT, AS I SAID, AS  
5 LATE AS 2011. SO WE ARE NOT GOING BACK TO THE BEGINNING OF  
6 TIME, WE ARE HERE IN THE PERIOD WHERE ARISTA HAS SAID THIS IS  
7 WHEN WE WERE TARGETING THESE CUSTOMERS.

8 SO AND WHAT ELSE DO WE SEE? THIS IS AGAIN, THIS IS 2014,  
9 SLIGHTLY BEFORE THIS LAWSUIT WAS FILED, BUT AGAIN, MUCH LATER  
10 IN TIME, AND WHAT DOES IT SAY? MICROSOFT WANTS US TO MATCH THE  
11 CISCO FORMAT EXACTLY, THIS IS TALKING ABOUT THE OUTPUTS, AND  
12 ARE NOT WILLING TO MODIFY THEIR SERVER SIDE SCRIPTS TO PARSE  
13 DIFFERENT FORMATS COMING FROM CISCO AND ARISTA SWITCHES.

14 SO MICROSOFT CARES, 2014. MS. ELSTEN'S ENTIRE OPINION IS  
15 BASED UPON THE FACT THAT MICROSOFT DOESN'T CARE AT ALL, BUT  
16 THAT'S NOT WHAT THE EVIDENCE SHOWS.

17 SO HERE IN THE END, UNDISPUTED, THERE WAS 1.3 BILLION,  
18 THAT'S HOW MUCH ARISTA TOOK IN REVENUES BASED ON THE SALE OF  
19 THESE INFRINGING SWITCHES FROM DECEMBER 2011 TO MARCH 2016  
20 BECAUSE WE DON'T HAVE DATA PAST THEN.

21 AND HERE YOU HEARD FROM DR. CHEVALIER WHAT THOSE NUMBERS  
22 ARE. SO THE LOST PROFITS TO CISCO, THAT'S 311 MILLION. I'M  
23 NOT GOING TO GO BACK THROUGH ALL OF THE THINGS SHE DISCUSSED,  
24 YOU HEARD HER TESTIMONY VERY RECENTLY.

25 THE, WHAT AMOUNT OF ARISTA'S PROFITS IS CISCO ENTITLED TO

1 RECOVER, I THINK YOU HEARD DURING THE TESTIMONY THAT THAT'S  
2 REFERRED TO SOMETIMES AS DISGORGEMENT. THAT'S THE 22 MILLION  
3 NUMBER.

4 AND FINALLY, FOR THE PATENT, THIS IS THE DESIGN-AROUND  
5 COST. IN OTHER WORDS, WHAT WOULD IT COST TO DESIGN AROUND THE  
6 PATENT SO YOU NO LONGER INFRINGE. THAT'S THE \$2.2 MILLION.

7 SO LET ME JUST -- I'M GOING TO HAVE THE OPPORTUNITY TO GET  
8 BACK UP. IT'S NOT GOING TO BE ANOTHER HOUR AND TEN MINUTES,  
9 YOU DON'T HAVE TO WORRY ABOUT THAT, BUT AFTER ARISTA'S COUNSEL  
10 TALKS TO RESPOND TO SOME OF THOSE ISSUES, SO I WILL HAVE THE  
11 OPPORTUNITY TO TALK TO YOU AGAIN.

12 BUT AS YOU ARE GOING THROUGH AND LISTENING TO ARISTA'S  
13 COUNSEL, AND I INVITE YOU TO DO SO, YOU SHOULD ABSOLUTELY DO  
14 THAT, THINK ABOUT AS YOU ARE HEARING THINGS, WHAT EVIDENCE  
15 YOU'VE SEEN AND WHAT THINGS WERE SAID BEFORE THIS LAWSUIT CAME  
16 ABOUT AND BEFORE ARISTA CAME INTO COURT TO OFFER THE EXCUSES.

17 AND THEN, IF YOU KEEP THAT IN MIND AND YOU GO BACK TO THE  
18 JURY ROOM, LOOK AT THAT EVIDENCE, LOOK AT THE LAW, AND THE  
19 VERDICT, AS I'VE WALKED THROUGH AND TOLD YOU, SHOULD BE FOR  
20 CISCO IN THIS CASE.

21 SO I THANK YOU. I APPRECIATE YOUR TIME. AND I WILL SEE  
22 YOU AGAIN IN A LITTLE BIT.

23 THE COURT: THANK YOU, MR. NELSON.

24 ALL RIGHT. LET'S TAKE A SHORT BREAK. I KNOW THERE'S SOME  
25 SET UP WE NEED TO DO. LET'S JUST MAKE IT FIVE-MINUTES AND THEN

11:22:24 1 WE WILL COME BACK.

11:22:27 2 (RECESS FROM 11:22 A.M. UNTIL 11:27 A.M.)

11:22:47 3 THE COURT: ALL OF OUR JURORS ARE HERE.

11:28:27 4 MR. VAN NEST, WOULD YOU LIKE TO GIVE YOUR CLOSING  
11:28:30 5 ARGUMENT?

11:28:30 6 MR. VAN NEST: I WOULD, YOUR HONOR.

11:28:31 7 THE COURT: GO AHEAD, PLEASE.

11:28:32 8 MR. VAN NEST: THANK YOU VERY MUCH.

11:28:33 9 **CLOSING ARGUMENTS BY MR. VAN NEST**

11:28:35 10 GOOD MORNING, LADIES AND GENTLEMEN, I'M VERY HAPPY TO BE  
11:28:38 11 UP HERE AND VERY PROUD TO BE HERE ON BEHALF OF ARISTA NETWORKS.

11:28:41 12 I WANT TO THANK YOU FIRST FOR BEING SUCH DILIGENT JURORS.  
11:28:44 13 WE REALLY DO APPRECIATE YOUR SERVICE. I KNOW WITH THE HOLIDAYS  
11:28:47 14 COMING UP, EVERYBODY HAS BUSY LIVES AND WE APPRECIATE THE FACT  
11:28:51 15 THAT YOU HAVE BEEN HERE TIMELY AND PAYING ATTENTION EVERY DAY,  
11:28:53 16 THAT'S VERY IMPORTANT.

11:28:54 17 I TOLD YOU A COUPLE OF WEEKS AGO, THIS DISPUTE IS VERY  
11:28:59 18 IMPORTANT, NOT ONLY FOR ARISTA, BUT FOR TECHNOLOGY AND  
11:29:05 19 INNOVATION TOO, BECAUSE CISCO IS TRYING TO CHANGE ALL THE RULES  
11:29:08 20 AROUND TECHNOLOGY AND INNOVATION, ESPECIALLY IN NETWORKING.

11:29:12 21 NOW YOU'VE HEARD TESTIMONY NOT ONLY FROM THE ARISTA  
11:29:15 22 LEADERSHIP AND THE ENGINEERS AT ARISTA, BUT ALSO FROM THIRD  
11:29:19 23 PARTIES, DELL, JUNIPER, HEWLETT-PACKARD, THEY CAME AS WELL.  
11:29:26 24 AND KEY TESTIMONY FROM FORMER CISCO MANAGERS LIKE MR. VOLPI,  
11:29:29 25 AND MR. GIANCARLO, ALONG WITH FORMER CISCO ENGINEERS, TONY LI,

11:29:36 1 DOUG GOURLAY AND DEVADAS PATIL.

11:29:40 2 AND TOGETHER, THE TESTIMONY OF THESE WITNESSES WAS VERY  
11:29:42 3 CLEAR, VERY CONSISTENT, AND EXPLAINED WHAT ACTUALLY WENT ON IN  
11:29:47 4 THE MARKET PLACE WE ARE TALKING ABOUT, SOMETHING WHICH CISCO  
11:29:51 5 WANTS TO AND DID IN THEIR CLOSING ARGUMENT, COMPLETELY IGNORE.

11:29:56 6 THAT TESTIMONY TAKEN AS A GROUP, PROVES THAT THE ARISTA  
11:30:02 7 SWITCH WAS BUILT BY ARISTA ENGINEERS USING ARISTA TECHNOLOGY  
11:30:08 8 AND MILLIONS OF LINES OF ORIGINAL SOURCE CODE, NOT ONE LINE OF  
11:30:12 9 WHICH WAS COPIED FROM CISCO. IT'S NOW UNDISPUTED. NO EVIDENCE  
11:30:16 10 THAT ANY OF THE SOURCE CODE CREATED IN THIS SWITCH WAS COPIED.  
11:30:24 11 AND IT'S COMPLETELY DIFFERENT, AS YOU HEARD, FROM IOS, THE  
11:30:28 12 CISCO VERSION OF ITS SOFTWARE.

11:30:30 13 AS MR. DUDA AND MR. HOLBROOK EXPLAINED, IT'S THAT SOFTWARE  
11:30:33 14 WORKING WITH THE HARDWARE THAT MAKES THIS SWITCH SO SUCCESSFUL,  
11:30:37 15 AND BOY HAS IT BEEN SUCCESSFUL. IT'S BEEN PHENOMENAL AND  
11:30:40 16 SUCCESSFUL IN THE MARKETPLACE.

11:30:42 17 THEY'VE CHANGED EVERYTHING BECAUSE THIS IS A MAJOR MARKET  
11:30:45 18 TRANSITION TO THE CLOUD, RIGHT, AND IT'S BEING LEAD BY ARISTA  
11:30:49 19 AND ARISTA'S PRODUCTS.

11:30:50 20 AS WE SAID, UNDISPUTED NOW, TEN TIMES FASTER, MORE  
11:30:55 21 RELIABLE, MORE PORTS. SO IT CAN HANDLE MORE STUFF, USES LESS  
11:31:00 22 POWER. WHY, OTHERWISE, WOULD PEOPLE LIKE GOOGLE, MICROSOFT,  
11:31:07 23 FACEBOOK, THE LEADING TECHNOLOGY, COMPANIES IN OUR COMMUNITY,  
11:31:09 24 WHY WOULD THEY BE USING THIS SWITCH IF IT HADN'T BEEN FOR THAT?

11:31:13 25 AND ARISTA DID IT WITH JUST A FEW HUNDRED ENGINEERS

11:31:21 1 COMPETING WITH COMPANIES 20 TIMES THEIR SIZE. CISCO HAD 75,000  
11:31:27 2 EMPLOYEES, HAD ABOUT 1400.

11:31:28 3 EVEN CISCO RECOGNIZES, AND WE WILL REVIEW THE EVIDENCE IN  
11:31:31 4 DETAIL IN JUST A MINUTE, BECAUSE THIS IS WHERE I WANT TO START,  
11:31:34 5 THEY RECOGNIZE THIS AS TRANSFORMATIVE. THEY CALL IT A NEW  
11:31:37 6 PARADIGM. MR. CHAMBERS SPENT A BILLION DOLLARS TRYING TO CATCH  
11:31:42 7 UP TO IT THROUGH INSIEME, AND HIS MANAGERS TOLD HIM ARISTA IS  
11:31:46 8 OUTPERFORMING US ON PRODUCT, ROAD MAP AND VISION, RIGHT? ALL  
11:31:51 9 IN THE EVIDENCE THAT WE ARE GOING TO REVIEW.

11:31:53 10 NOW, THERE'S ALSO NO DISPUTE, THEY SPENT A LOT OF TIME ON  
11:31:58 11 COPYING. THERE'S NEVER BEEN A DISPUTE THAT ARISTA DESIGNED ITS  
11:32:03 12 SWITCHES TO RECOGNIZE A SMALL FRACTION OF THE COMMAND LINES IN  
11:32:08 13 IOS. CISCO'S IOS HAS 16,000 OF THESE COMMAND LINES, 16,000.  
11:32:14 14 AND ARISTA SWITCHES WERE DESIGNED TO USE SOME OF THOSE.

11:32:19 15 ARISTA, LIKE EVERYBODY ELSE IN THE INDUSTRY, BELIEVED THAT  
11:32:24 16 CISCO HAD MADE THESE LINES AVAILABLE, MADE THEM AVAILABLE AS AN  
11:32:28 17 INDUSTRY STANDARD. AND SO ARISTA, LIKE EVERYONE ELSE, COPIED  
11:32:33 18 SOME OF THE COMMAND LINES TO USE IN ITS PROTECTS.

11:32:36 19 BUT, THAT'S NOT A SECRET, IT'S NEVER BEEN A SECRET. YOU  
11:32:41 20 SAW THE EVIDENCE IN THEIR CLOSING ARGUMENT. ARISTA, FROM DAY  
11:32:44 21 ONE, HAS BEEN SAYING WE ARE CISCO-LIKE, WE ARE IOS-LIKE. THEY  
11:32:47 22 DID IT IN BLOGS, THEY DID IT IN DATA SHEETS, THEY DID IN  
11:32:53 23 CONFERENCES, IT WAS OPEN AND WIDELY KNOWN. THAT'S BECAUSE  
11:32:58 24 NOBODY AT ARISTA, MANY OF WHOM HAD WORKED AT CISCO, THOUGHT  
11:33:00 25 THERE WAS NOTHING WRONG WITH THAT.

11:33:02 1 AND GUESS WHAT? CISCO DIDN'T THINK THERE WAS ANYTHING  
11:33:04 2 WRONG WITH THAT EITHER. CISCO KNEW FROM DAY ONE WHAT COMMAND  
11:33:09 3 LINE REFERENCES ARISTA WAS USING. THEY BOUGHT A SWITCH EARLY  
11:33:12 4 ON, THEY ANALYZED IT, THEY STUDIED IT.

11:33:14 5 YOU SAW THAT EVIDENCE, MR. GOURLAY TESTIFIED THAT AS EARLY  
11:33:17 6 AS 2009, ALL THE FOLKS AT CISCO WERE AWARE OF THE COMMAND-LINE  
11:33:23 7 INTERFACE THAT ARISTA WAS USING, AND YET, DID THEY COMPLAIN?  
11:33:26 8 NO. NO COMPLAINT WHATSOEVER. '09, '10, '11, '12, 2013, NO  
11:33:31 9 COMPLAINT. WHY? BECAUSE AS THE EVIDENCE SHOWS OVERWHELMINGLY,  
11:33:36 10 AND WE ARE GOING TO REVIEW THIS TOO, LONG BEFORE ARISTA CAME  
11:33:38 11 ALONG, CISCO WAS PROMOTING ITS OWN CLI AS INDUSTRY STANDARD.

11:33:45 12 THEY PROMOTED IT IN THEIR OWN DATA SHEETS, THEY PROMOTED  
11:33:49 13 IT AT THEIR USER CONFERENCES, THEY PROMOTED IT IN WHITE PAPERS,  
11:33:54 14 THEY PROMOTED IT TO EVERYONE. AND GUESS WHAT? NOW WE KNOW  
11:33:56 15 WHY. MR. VOLPI AND MR. GIANCARLO TOLD US, THEY TESTIFIED THAT  
11:34:01 16 CISCO MADE A CONSCIENCE BUSINESS DECISION TO ALLOW OTHERS TO  
11:34:06 17 COPY THEIR CLI BECAUSE CUSTOMERS WANTED IT AND BECAUSE IT  
11:34:11 18 ALLOWED CISCO TO SAY EVERYONE ELSE IS FOLLOWING US, WE ARE THE  
11:34:16 19 LEADER.

11:34:17 20 MR. GIANCARLO SAID NO ONE AT CISCO THOUGHT THAT THESE WERE  
11:34:20 21 EVEN PROTECTABLE, AND THEREFORE BOTH MR. VOLPI AND  
11:34:25 22 MR. GIANCARLO, TWO OF THE MOST SENIOR LEADERS AT CISCO, RIGHT  
11:34:29 23 UNDERNEATH MR. CHAMBERS, THEY BOTH TESTIFIED IN AN UNIMPEACHED  
11:34:35 24 WAY, THEY DIDN'T EVEN -- CISCO'S LAWYERS NEVER EVEN TOUCHED  
11:34:39 25 THIS, THAT THIS WAS A CONSCIENCE DECISION.



11:34:42 1 NOW WHAT THEN HAPPENED, ALL THE TOP PLAYERS IN THE MARKET  
11:34:45 2 USED SOME NUMBER OF COMMANDS, THEY ALL DID. HP DID, JUNIPER IN  
11:34:51 3 ITS JUNOS-E PRODUCT DID, DELL DID. AS A MATTER OF FACT, THE  
11:34:56 4 ONLY PRODUCT THAT DR. BLACK WAS ABLE TO ANALYZE FULLY, THE DELL  
11:35:00 5 PRODUCT, HAD 1600 COMMANDS THAT OVERLAP. NOT 500, 1600 IN  
11:35:07 6 DELL.

11:35:09 7 AND THAT'S PROBABLY TRUE FOR THE WHOLE REST OF THE GROUP,  
11:35:12 8 TOO. WE SIMPLY WEREN'T ABLE TO ANALYZE EVERYBODY'S MANUALS AND  
11:35:16 9 ALL OF THAT MOUNTAIN OF MATERIAL.

11:35:19 10 NOW, TONY LI TESTIFIED THAT HIS COMPANY BUILT A SWITCH TO  
11:35:25 11 COMPETE DIRECTLY WITH CISCO AND HE BUILT HIS CLI BUG-TO-BUG  
11:35:29 12 COMPATIBLE. BUG-TO-BUG COMPATIBLE WITH CISCO.

11:35:33 13 CISCO DIDN'T COMPLAIN, IT WAS CONSISTENT WITH THEIR  
11:35:35 14 BUSINESS PLAN, THEY WERE AN INVESTOR, IT WAS CONSISTENT WITH  
11:35:39 15 THEIR DECISION TO MAKE THESE PUBLIC, MAKE THEM AN INDUSTRY  
11:35:42 16 STANDARD AND BRAG ABOUT THAT, WHICH THEY DID REPEATEDLY.

11:35:45 17 NOW WHAT ARE THEY PRESENTING YOU AS A BASIS FOR THE LAWS,  
11:35:51 18 NOTHING HAVING TO DO WITH THE ORIGINAL SOURCE CODE IN HERE,  
11:35:53 19 NOTHING. THEY ARE PRESENTING A MANUAL TYPED-IN COMMAND ENTRY  
11:35:57 20 SYSTEM THAT IS 40 YEARS OLD. 40 YEARS OLD. THAT'S WHAT WE ARE  
11:36:02 21 HERE TALKING ABOUT. SOMETHING THAT EVERYBODY ACKNOWLEDGES WAS  
11:36:06 22 CREATED IN THE 70'S, AND MR. LOUGHEED DIDN'T START ON UNTIL THE  
11:36:14 23 80'S AT CISCO, BUT THESE COMMAND-LINE INTERFACES ARE SIMPLE,  
11:36:17 24 TWO TO FOUR-WORD DESCRIPTIONS OF COMMANDS THAT ARE STANDARD IN  
11:36:20 25 THE INDUSTRY.

11:36:21 1           THEY COME FROM LEGACY SYSTEMS, THEY USE TERMS THAT ARE  
11:36:26 2           PART OF INDUSTRY STANDARD PROTOCOLS TO DESCRIBE THOSE  
11:36:31 3           PROTOCOLS, AND THEY ARE NOT CREATIVE.

11:36:33 4           LET'S GET REAL. THE ENGINEERS AT CISCO WERE TOLD, DO NOT  
11:36:37 5           BE CREATIVE WITH THESE. IF THERE'S AN INDUSTRY STANDARD TERM,  
11:36:40 6           USE IT. USE SOMETHING FAMILIAR. USE SOMETHING EVERYBODY  
11:36:46 7           ALREADY KNOWS.

11:36:47 8           THESE ARE SUPPOSED TO BE SELF-EXPLANATORY. WE ARE GOING  
11:36:50 9           TO INNOVATE INSIDE THE PRODUCT. WE ARE NOT GOING TO INNOVATE  
11:36:56 10          WITH A 40-YEAR OLD COMMAND-LINE INTERFACE THAT ALL THE  
11:36:58 11          CUSTOMERS ARE USING.

11:37:00 12          SO THE EVIDENCE WILL SHOW OVERWHELMINGLY THAT THERE HAS  
11:37:03 13          BEEN NO INFRINGEMENT OF ANY CISCO INTELLECTUAL PROPERTY,  
11:37:08 14          NOTHING THAT THE ARISTA ENGINEERS USE FROM THE COMMAND-LINE  
11:37:12 15          INTERFACE WAS PROTECTABLE IN THE FIRST PLACE, BECAUSE IT'S NOT  
11:37:15 16          ORIGINAL, IT'S NOT CREATIVE OR THE LAW DOESN'T PROTECT IT, AND  
11:37:18 17          THEY HAVEN'T PROVED PATENT INFRINGEMENT BY A MILE.

11:37:22 18          AND THE EVIDENCE WILL SHOW THAT ARISTA'S USE OF THESE, OF  
11:37:26 19          A VERY SMALL FRACTION OF COMMAND LINES WAS FAIR, REASONABLE,  
11:37:33 20          CONSISTENT WITH CISCO'S BUSINESS PRACTICES AT THE TIME, AND HAS  
11:37:37 21          CAUSED CISCO NO HARM WHATSOEVER. THEY ARE CLAIMING HARM TO  
11:37:41 22          THEIR CLI, THIS 40-YEAR OLD TECHNOLOGY.

11:37:44 23          TO THE EXTENT CISCO HAS FALLEN BEHIND, IT'S BECAUSE THEY  
11:37:47 24          MISSED THE TRANSITION TO THE CLOUD, AS MR. CHAMBERS CANDIDLY  
11:37:50 25          ADMITTED LAST MONDAY. THEY MISSED THE TRANSITION, THEY WERE

11:37:54 1 BEHIND.

11:37:54 2 SO TO THE EXTENT THEY ARE SUFFERING, IT HAS NOTHING TO DO  
11:37:57 3 WITH THE FACT THAT ARISTA IS USING THE SAME COMMANDS THAT  
11:38:03 4 EVERYBODY ELSE IN THE INDUSTRY IS USING.

11:38:08 5 SO LET ME GO TO MY KEY POINTS OF EVIDENCE, AND AS  
11:38:11 6 JUDGE FREEMAN TOLD YOU, WE ARE GOING TO TALK HERE UNTIL LUNCH  
11:38:14 7 TIME AND FINISH UP.

11:38:15 8 I WANT TO START HERE THAT ARISTA SWITCHES WERE DESIGNED  
11:38:18 9 FROM SCRATCH, NOT COPIED FROM CISCO. THAT'S NOT DISPUTED AND  
11:38:23 10 THOSE SWITCHES ARE REVOLUTIONARY TOO.

11:38:25 11 CISCO PROMOTED ITS CLI AS AN INDUSTRY STANDARD FOR ITS OWN  
11:38:29 12 BENEFIT. THERE'S ENORMOUS AMOUNT OF EVIDENCE ON THAT. WE SAT  
11:38:34 13 EVERY SINGLE DAY WITH EVERY SINGLE WITNESS, WE SAW EVIDENCE  
11:38:38 14 THAT CISCO WAS PROMOTING THESE AS INDUSTRY STANDARD.

11:38:42 15 THIRD, COPYING UN PROTECTABLE ELEMENTS OF THE CLI IS NOT  
11:38:45 16 INFRINGEMENT. WE HEARD TWO WEEKS OF TESTIMONY FROM CISCO ABOUT  
11:38:50 17 THESE COMMAND LINES, JUDGE FREEMAN HAS TOLD YOU THESE  
11:38:55 18 INDIVIDUAL COMMAND LINES, THE MULTIWORD COMMAND LINES THAT WE  
11:38:59 19 ARE TALKING ABOUT, THEY ARE NOT EVEN PROTECTABLE BY LAW, NOT  
11:39:02 20 EVEN PROTECTABLE. THEY HAVEN'T PROVEN THAT THEY HAVE SOME  
11:39:07 21 UNIQUE COMPILATION OF THESE, NOT BY A MILE.

11:39:10 22 AND FINALLY, ARISTA'S USE OF THE IOS CLI IS A FAIR USE  
11:39:13 23 CONSISTENT WITH INDUSTRY PRACTICES.

11:39:16 24 BY THE WAY, "FAIR USE" LOOKS TO THE PUBLIC INTEREST. I  
11:39:19 25 HEARD IT CALLED AN EXCUSE. IT'S IN THE COPYRIGHT STATUTE. IT

11:39:23 1 HAS THE SAME STATURE AND IMPORTANCE AS THE COPYRIGHT LAW  
11:39:28 2 ITSELF, IT'S PART OF THE COPYRIGHT LAW.

11:39:30 3 AND OUR POINT THERE IS THAT THE NETWORKING INDUSTRY HAS  
11:39:33 4 BEEN USING THESE COMMANDS FOR YEARS AND YEARS WITH NO COMPLAINT  
11:39:38 5 FROM CISCO WHATSOEVER.

11:39:40 6 ALL RIGHT. LET'S START ON POINT ONE. WE HAVE BEEN  
11:39:44 7 TALKING ABOUT TRANSFORMATIVE USE AND NOW YOU HAVE A DEFINITION.  
11:39:47 8 AND IT DOESN'T MEAN, IT'S NOT LIMITED TO TRANSFORMING JUST THE  
11:39:51 9 CLI, ALTHOUGH THE ENGINEERS AT ARISTA DID THAT. A USE IS  
11:39:55 10 TRANSFORMATIVE IF IT ADDS SOMETHING NEW WITH A FURTHER PURPOSE  
11:39:59 11 OR DIFFERENT CHARGE, ALTERING THE FIRST WITH NEW EXPRESSION,  
11:40:03 12 MEANING OR MESSAGE. OKAY.

11:40:06 13 WHAT'S TRANSFORMATIVE? WHAT'S TRANSFORMATIVE IS USING  
11:40:10 14 THESE CLI'S, AS DR. BLACK DESCRIBED IT, TAKING A SMALL FRACTION  
11:40:16 15 OF WHAT'S IN IOS, CREATING A BRAND-NEW SWITCH WITH NEW SOURCE  
11:40:21 16 CODE, NEW FEATURES, THOUSANDS OF ARISTA'S OWN NEW COMMANDS, FOR  
11:40:26 17 HIGH SPEED NETWORKING IN THE CLOUD, THAT'S WHAT WE ARE TALKING  
11:40:29 18 ABOUT. AND THAT IS TRANSFORMATIVE IN THE LAW.

11:40:34 19 OUR NEXT SLIDE REMINDS US WHY THE CLI HAVE TO BE  
11:40:37 20 TRANSFORMED TO WORK IN THE CLOUD. WHEN YOU HAVE HUNDREDS OF  
11:40:40 21 THOUSANDS OF SERVERS AND MAYBE DOZEN -- TENS OF THOUSANDS OF  
11:40:46 22 SWITCHES, YOU CAN'T ENTER THEM MANUALLY WITH THE CLI, IT'S GOT  
11:40:50 23 TO BE FULLY AUTOMATED, WHICH IS WHAT THE FOLKS AT ARISTA DID.  
11:40:54 24 DOES NOT WORK ANYMORE.

11:40:55 25 NEXT SLIDE.

11:40:57 1 WHY ARE GOOGLE, FACEBOOK AND MICROSOFT USING THESE?

11:41:00 2 RIGHT? WHY IS ARISTA LEADING THE MARKET THERE? BECAUSE THESE  
11:41:04 3 ARE THE MOST ADVANCED TECHNOLOGY COMPANIES AND THEY NEED THE  
11:41:07 4 MOST ADVANCED WAY TO DO IT.

11:41:09 5 MR. CHAMBERS MAY BE THE BEST WITNESS TO HOW BIG A CHANGE  
11:41:13 6 THIS IS, RIGHT. HE SAID DURING HIS EXAMINATION ON MONDAY,  
11:41:16 7 THERE'S A MARKET TRANSITION UNDER WAY IN NETWORKING. HE  
11:41:19 8 COMPARED IT TO THE CHANGE WHEN VOICE OVER INTERNET CAME IN, HE  
11:41:24 9 COMPARED IT TO THE CHANGE WITH VIDEO OVER INTERNET CAME IN.  
11:41:28 10 BIG DEAL. A VERY IMPORTANT ONE, YES.

11:41:31 11 AND WHO IS THE MARKET LEADER IN THAT MARKET TRANSITION?  
11:41:35 12 THIS SWITCH RIGHT HERE. AND I WILL TALK IN DETAIL ABOUT EACH  
11:41:38 13 OF THESE IN JUST A MINUTE. BUT YOU'VE HEARD ALL THE WITNESSES  
11:41:41 14 TESTIFY THAT THERE ARE AUTOMATION TOOLS THAT CHANGE HOW THE CLI  
11:41:45 15 IS USED, IT'S MORE RELIABLE BECAUSE OF THE ARCHITECTURE, IT'S  
11:41:49 16 HIGHER SPEED, TEN TIMES FASTER, IT'S POWER EFFICIENT USE, IT IS  
11:41:57 17 1/5TH THE POWER.

11:41:58 18 AND OPEN PROGRAMMABLE IS KEY TOO BECAUSE IT PROVIDES A  
11:42:00 19 PLATFORM THAT CUSTOMERS CAN ADAPT AND PROGRAM ON TOP OF.

11:42:05 20 THIS DIDN'T HAPPEN OVERNIGHT, AS YOU SAW, THE TESTIMONY  
11:42:08 21 FILLED IN THAT THERE ARE 6 MILLION LINES OF CODE INSIDE THE EOS  
11:42:12 22 SOFTWARE. 650 ENGINEERS, THAT'S NOT AN ARMY, BUT THAT'S ENOUGH  
11:42:18 23 TO DO WHAT THEY DID, AND \$750 MILLION IN RESEARCH AND  
11:42:23 24 DEVELOPMENT.

11:42:24 25 ALL RIGHT. WHAT IS SO TRANSFORMATIVE ABOUT THIS? YOU

11:42:27 1 HEARD THAT FROM DR. BLACK, YOU HEARD IT FROM MR. DUDA, YOU  
11:42:31 2 HEARD IT FROM MR. HOLBROOK.

11:42:33 3 LET ME START WITH MR. DUDA. REMEMBER HE DREW THIS DIAGRAM  
11:42:36 4 AND HE SAID WANTED TO START WITH A COMPLETELY DIFFERENT AND NEW  
11:42:40 5 ARCHITECTURE. SO IT'S A DISTRIBUTED ARCHITECTURE. IT HAS A  
11:42:45 6 CENTRAL DATABASE, BUT IT HAS DISTRIBUTED FEATURES ON THE  
11:42:48 7 OUTSIDE WHICH YOU HAVE TO HAVE FOR RELIABILITY IN THESE  
11:42:51 8 ENORMOUS DATA CENTERS.

11:42:54 9 WHAT HE SAID IS DOING IT THIS WAY IS IF ONE PROCESS GOES  
11:42:57 10 OUT, THE WHOLE THING DOESN'T GO OUT. IT'S ALSO EASIER TO  
11:43:00 11 UPDATE, EASIER TO CHANGE, YOU CAN TAKE A FEATURE OUT AND  
11:43:03 12 REPLACE IT ON THE FLY. AND THEN HE SAID WE TOOK THIS  
11:43:07 13 ARCHITECTURE AND WE PUT IS IT ON A LINUX KERNEL.

11:43:11 14 NOW LINUX IS AN OPEN SOURCE SOFTWARE THAT SOFTWARE  
11:43:13 15 DEVELOPERS ARE USED TO USING. IT'S AN OPERATING SYSTEM, IT'S A  
11:43:17 16 BASE. WHAT DOES THAT MEAN? IT FREES UP CUSTOMERS FROM THESE  
11:43:22 17 PROPRIETARY SYSTEMS.

11:43:24 18 REMEMBER WHEN APPLE FIRST CAME OUT WITH THE IPHONE, THAT  
11:43:28 19 WAS IT, YOU COULDN'T PUT APPS ON IT FROM ANYBODY OTHER THAN  
11:43:31 20 APPLE, IT WAS A CLOSED SYSTEM, PROPRIETARY. THAT'S HOW  
11:43:35 21 SWITCHES HAVE BEEN FOREVER. THAT'S HOW THE CISCO SWITCHES HAVE  
11:43:38 22 BEEN FOREVER. ARISTA OPENED THAT UP WITH LINUX SOFTWARE,  
11:43:41 23 DEVELOPERS CAN REDESIGN THE SWITCH TO MAKE IT BETTER AND MAKE  
11:43:44 24 IT MORE SUITABLE FOR THEIR NEEDS.

11:43:47 25 NOW AFTER MR. DUDA, YOU HEARD FROM MR. HOLBROOK. HE

11:43:50 1 BROUGHT THIS CIRCUIT BOARD TO EXPLAIN A COUPLE OF KEY THINGS.  
11:43:54 2 ONE, HE SAID WE WERE THE FIRST TO PUT SIX OF THESE VERY  
11:44:00 3 POWERFUL PROCESSORS ON THE SAME BOARD. THE MANUFACTURER SAID  
11:44:05 4 IT COULDN'T BE DONE, CUSTOMERS SAID IT COULDN'T BE DONE, BUT  
11:44:10 5 THEY DID IT.

11:44:11 6 AND WHAT DID THAT MEAN? THEY PACKED THE SWITCH WITH POWER  
11:44:15 7 WHICH MEANT THEY COULD PUT MORE PORTS ON THEM. THAT'S HOW  
11:44:18 8 ARISTA GOT TO THESE BIG NUMBERS OF PORTS AND BIG NUMBERS OF  
11:44:22 9 CAPACITY BY DESIGNING THIS BOARD WITH ALL THAT POWER.

11:44:25 10 AND YOU REMEMBER THE OTHER FEATURE THAT MR. HOLBROOK  
11:44:28 11 TALKED ABOUT WAS THE ZERO TOUCH PROVISIONING. YOU ARE NOT  
11:44:32 12 TOUCHING THE CLI. WHY IS THAT IMPORTANT? THAT MEANS THAT IN  
11:44:36 13 ONE OF THESE BIG DATA CENTERS WE LOOKED AT, ONE OF THE CLOUD  
11:44:39 14 CENTERS, A CUSTOMER CAN SET IT UP AND GET IT UP AND RUNNING, I  
11:44:44 15 THINK MR. HOLBROOK SAID TWO HOURS, TWO HOURS, WHAT USED TO TAKE  
11:44:48 16 TWO WEEKS.

11:44:50 17 THAT IS REALLY REMARKABLE. AND THAT'S THE KIND OF  
11:44:53 18 PERFORMANCE THAT THESE CHANGES HAVE BROUGHT ABOUT FOR  
11:44:56 19 NETWORKING CUSTOMERS AND NETWORKING IN GENERAL. THAT IS  
11:44:59 20 TRANSFORMATIVE USE.

11:45:00 21 AND DR. BLACK TALKED ABOUT NOT ONLY ALL OF THESE CHANGES,  
11:45:07 22 BUT CHANGES TO THE CLI ITSELF. AND THAT'S IMPORTANT. AND I  
11:45:12 23 THINK WE HAD A DRAWING FROM DR. BLACK AS WELL. THIS IS IT.  
11:45:19 24 JSON.

11:45:20 25 WHAT HE DESCRIBED LAST WEEK ON FRIDAY, I BELIEVE, WAS

11:45:26 1 OBVIOUSLY A MANUAL ENTRY SYSTEM WHERE YOU ARE GOING TO  
11:45:30 2 CONFIGURE ONE SWITCH AT A TIME, DOES NOT WORK WELL WITH 40,000  
11:45:36 3 SWITCHES IN YOUR NETWORK, RIGHT? THAT'S A NONSTARTER.

11:45:39 4 YOU'VE GOT TO HAVE A WAY OF AUTOMATING IT SO THAT THE  
11:45:42 5 COMPUTER, ITSELF, DOES THAT CONFIGURATION. THAT'S HOW COME UP  
11:45:46 6 CAN SET UP A SYSTEM IN TWO HOURS AND NOT TWO WEEKS.

11:45:51 7 SO HE DESCRIBED TAKING THE CLI AND MODIFYING IT WITH NEW  
11:45:56 8 CODE AND PACKAGING IT INSIDE WHAT HE CALLED AN EAPI SO THAT IT  
11:46:02 9 COULD BE OPERATED AUTOMATICALLY BY THE SOFTWARE THAT GOOGLE AND  
11:46:07 10 FACEBOOK AND MICROSOFT DESIGNED THEMSELVES AND GET THEMSELVES  
11:46:11 11 IN A POSITION TO RUN THESE DATA CENTERS AUTOMATICALLY, WHICH IS  
11:46:16 12 WHAT THEY HAVE TO DO.

11:46:19 13 NOW, YOU DON'T HAVE TO TAKE IT FROM THEM, THE MARKET HAS  
11:46:23 14 SPOKEN TOO, YOU SAW THIS IN THE OPENING AND THE WITNESSES FILL  
11:46:26 15 TODAY IN.

11:46:27 16 ARISTA LAUNCHED THE FIRST HIGH SPEED 48-PORT SWITCH 2 TO  
11:46:32 17 3 YEARS BEFORE ANYBODY ELSE, RIGHT? WHEN OTHERS WERE DOWN  
11:46:35 18 THERE WITH 12 TO 18 PORTS, ARISTA WAS ALREADY AT 48. AND IN  
11:46:40 19 2010, NETWORK WORLD TESTED ARISTA AGAINST THE MARKET AND  
11:46:44 20 AGAINST CISCO AND ARISTA CAME OUT ON TOP IN VIRTUALLY EVERY  
11:46:48 21 CATEGORY.

11:46:49 22 AND BY 2010 THEY NOW HAD A 384-PORT SWITCH RUNNING AT HIGH  
11:46:55 23 SPEED, TEN GIGABIT. NOBODY ELSE WAS EVEN AT 60. THEY WERE 5  
11:46:59 24 TO 6 TIMES THE CAPACITY OF ANYBODY ELSE AND MUCH HIGHER SPEED.

11:47:04 25 AND FOLLOWING THAT, THEY KEPT ADDING PORTS AND ADDING



11:47:08 1 SPEED. THEY GOT TO 1,000 PORTS, THEY GOT TO 40 GIGABIT SPEEDS,  
11:47:13 2 THEY GOT THERE FASTER THAN ANYBODY ELSE.

11:47:17 3 YOU DON'T HAVE TO ACCEPT EVEN THE EVIDENCE FROM THE  
11:47:21 4 MARKET, BECAUSE CISCO AGREES. NOTE NOW, I'VE GOT A TRIAL  
11:47:26 5 EXHIBIT NUMBER ON HERE, JUST BECAUSE EVERYONE HAS BEEN SAYING  
11:47:29 6 YOU ARE GOING TO HAVE TRIAL EXHIBITS BACK THERE, BUT THESE  
11:47:34 7 BEAUTIFUL SLIDES, YOU WON'T HAVE THOSE. YOU WON'T HAVE THE  
11:47:36 8 SLIDES.

11:47:36 9 SO THIS IS TRIAL EXHIBIT 5119. IT'S MR. PATIL'S THESIS.  
11:47:42 10 HE'S A FORMER CISCO ENGINEER. HE LOOKED AT ARISTA AS A MARKET  
11:47:48 11 STUDY AND SAID IT'S A NEW PARADIGM. ARISTA IS AN EXAMPLE OF  
11:47:53 12 INNOVATION IN THIS AREA, IT'S A NEW PARADIGM. HE DID A  
11:47:57 13 BEAUTIFUL MASTER THESIS, SPENT SIX MONTHS, THAT WAS HIS  
11:48:00 14 CONCLUSION.

11:48:01 15 NOW HERE WAS THE OFF-THE-CUFF CONCLUSION BY MR. REMAKER.  
11:48:05 16 NEXT ONE. YOU SAW THIS. IT'S GREAT. HE SAW ONE OF THE NEW  
11:48:08 17 FEATURES IN ARISTA'S PRODUCT, "WOW. UP TO PART THREE. KICK  
11:48:15 18 ASS. I WISH IOS DID THIS." YOUR BIGGEST COMPETITOR LOOKING AT  
11:48:22 19 YOUR PRODUCT, "IT WAS GREAT, I WISH IOS DID THIS."

11:48:24 20 AND THERE ARE MANY E-MAILS LIKE THIS. THE FINAL ONE I'M  
11:48:28 21 GOING TO TALK ABOUT IN THIS SECTION IS, THIS IS AN E-MAIL THAT  
11:48:31 22 MS. ULLAL RECEIVED FROM MORGAN STANLEY.

11:48:35 23 MORGAN STANLEY HAD BEEN USING CISCO SWITCHES FOR YEARS,  
11:48:38 24 BUT NOW THAT ARISTA HAD SOMETHING THIS HIGH SPEED, THAT WOULD  
11:48:42 25 HELP THE BANK PROCESS TRANSACTIONS MORE QUICKLY, MAKE MORE

11:48:46 1 MONEY, BOOM, "YOU MIGHT BE THE CEO OF THE MOST TRANSFORMATIVE  
11:48:50 2 NETWORKING COMPANY IN 20 YEARS."

11:48:53 3 LET ME MENTION ONE OTHER FACT THAT I THINK PROVES  
11:48:56 4 TRANSFORMATIVE USE. HOW OFTEN DOES A COMPANY GO OUT AND SPEND  
11:49:00 5 A BILLION DOLLARS TO DEVELOP WHAT MR. CHAMBERS CALLED AN ARISTA  
11:49:06 6 KILLER, RIGHT? THEY WENT OUT AND SPENT A BILLION DOLLARS ON  
11:49:10 7 INSIEME, THAT'S WHAT HE TESTIFIED TO LAST WEEK, HOPING TO  
11:49:14 8 DEVELOP AN ARISTA KILLER.

11:49:15 9 YOU DON'T SPEND THAT KIND OF MONEY TRYING TO COMPETE WITH  
11:49:19 10 SOMETHING ROUTINE, RIGHT, THAT'S A MAJOR MARKET TRANSITION,  
11:49:23 11 WHICH IS WHAT MR. CHAMBERS CALLED IT, AND THEY SPENT THAT MONEY  
11:49:27 12 TO CATCH UP IN THAT MARKET.

11:49:31 13 OKAY, LET'S LOOK AT OUR SECOND KEY POINT. AND THIS ONE  
11:49:35 14 HAS BEEN ESTABLISHED OVER, AND OVER, AND OVER AGAIN. CISCO  
11:49:39 15 PROMOTED ITS CLI AS AN INDUSTRY STANDARD FOR ITS OWN BENEFIT.

11:49:44 16 THIS GOES TO FAIR USE, THIS GOES TO ABANDONMENT OF THE  
11:49:50 17 COPYRIGHT. THESE FACTS ESTABLISH THE MARKET FACTS THAT THEY  
11:49:54 18 WANT TO IGNORE. YOU DIDN'T HEAR A WORD ABOUT ANY OF THIS IN  
11:49:57 19 THEIR CLOSING ARGUMENT BECAUSE THEY WANT TO PRETEND AS THOUGH  
11:50:00 20 NONE OF THIS EVER HAPPENED.

11:50:02 21 BUT LET'S SEE WHAT IT DID HAPPEN. 2003, THIS IS AN  
11:50:05 22 INTERNAL -- EXCUSE ME, IT'S A CUSTOMER PRESENTATION TO AT&T,  
11:50:11 23 AND THEY TOLD AT&T, IN 2003, CISCO IOS IS THE CURRENT  
11:50:19 24 DE FACTO STANDARD. THIS IS BACK IN 2003. BACK AT THE TIME OF  
11:50:23 25 HUAWEI. WE WILL TALK ABOUT HUAWEI IN A MINUTE.

11:50:26 1 2008, TRIAL EXHIBIT 5299. CAN I GO BACK ONE -- I JUST  
11:50:35 2 WANT TO BACK UP THE TRIAL EXHIBIT ON -- THIS FIRST ONE IS 5457.  
11:50:39 3 YOU MIGHT HAVE THAT IN YOUR NOTEBOOK, BUT IT'S AT PAGE 96, IT'S  
11:50:43 4 A BIG DOCUMENT. SO THAT'S PAGE 96.

11:50:45 5 2008, USES INDUSTRY STANDARD CISCO IOS CLI. SAME COMPANY,  
11:50:51 6 PROMOTING A NEXUS DATA SHEET, TRIAL EXHIBIT 5299. INDUSTRY  
11:50:58 7 STANDARD.

11:50:58 8 2012. TRIAL EXHIBIT 5454. THEY ARE NOW BRINGING OUT A  
11:51:04 9 NEW PRODUCT AND THEY ARE TALKING ABOUT THEIR NX-OS SOFTWARE,  
11:51:07 10 THAT COMPETES NOW WITH ARISTA, BUT JUST LIKE EVERYBODY ELSE, IT  
11:51:11 11 OFFERS THE SAME INDUSTRY STANDARD COMMAND LINE ENVIRONMENT.  
11:51:15 12 THE SAME INDUSTRY STANDARD COMMAND LINE ENVIRONMENT.

11:51:19 13 LET ME GO BACK TO THE PREVIOUS SLIDE, TOO, I WANT TO MAKE  
11:51:22 14 ANOTHER POINT.

11:51:23 15 NOTICE WHAT THEY ARE SAYING TO CUSTOMERS HERE. THEY  
11:51:28 16 CRITICIZE THIS WHEN THE REST OF THE INDUSTRY DOESN'T, NOW THEY  
11:51:32 17 DO IN COURT, BUT THEY WERE SAYING THE BENEFIT OF AN INDUSTRY  
11:51:35 18 STANDARD CLI IS FOR YOU, THE CUSTOMER, YOU MINIMIZE THE AMOUNT  
11:51:39 19 OF TIME NEEDED FOR OPERATORS TO LEARN THE SYSTEM.

11:51:42 20 THAT'S WHAT WE ARE TALKING ABOUT. IT'S A BENEFIT FOR  
11:51:45 21 CUSTOMERS, WHICH CISCO RECOGNIZED AND WANTED TO EMBRACE AND  
11:51:49 22 SAID OVER, AND OVER, AND OVER, AND MORE THAN THAT, CISCO SAID  
11:51:54 23 PUBLICLY, WE KNOW EVERYBODY IS USING OUR SYSTEM, LET'S LOOK AT  
11:51:58 24 THIS NEXT ONE.

11:51:59 25 TRIAL EXHIBIT 7996. CISCO LIVE. CISCO LIVE FOLKS IS LIKE

11:52:06 1 MAC WORLD. YOU KNOW, MAC WORLD IS APPLE'S BIG USER CONFERENCE,  
11:52:10 2 CISCO LIVE IS THE SAME THING FOR CISCO, THOUSANDS OF PEOPLE  
11:52:13 3 COME AND ATTEND.

11:52:14 4 WHAT DID THEY TELL THEM? JUST A COUPLE OF YEARS AGO,  
11:52:17 5 "OVER THE YEARS, THE BASIC LOOK AND FEEL OF THE COMMAND-LINE  
11:52:17 6 INTERFACE."

11:52:21 7 THAT'S THE SAME THING THEY SAY IS SO HIGHLY PROTECTED  
11:52:25 8 HERE, AND THEY ARE SUING OVER, HAS BEEN MIMICKED BY OTHER  
11:52:28 9 MANUFACTURERS. RECOPIED, TO THE POINT WHERE IT IS THE  
11:52:36 10 DE FACTO STANDARD OF NETWORK PROGRAMMING. OVER, AND OVER, AND  
11:52:39 11 OVER. NOT ONLY DID THEY PROMOTE IT, BUT THEY RECOGNIZED  
11:52:42 12 EVERYONE WAS USING IT. AND IN FACT, EVERYONE ELSE WAS.

11:52:49 13 NEXT SLIDE, PLEASE.

11:52:50 14 HERE'S A NORTEL PRESENTATION IN 2005. THEY'RE PROMOTING  
11:52:54 15 THEIR TEN GIGABIT SWITCH. THIS IS BEFORE ARISTA EVEN EXITED.  
11:52:58 16 WHAT DO THEY CALL IT? A CISCO-LIKE CLI. WE HAVE A CISCO-LIKE  
11:53:03 17 CLI. THAT'S 5441.

11:53:07 18 FORCE10, BEFORE THEY WERE BOUGHT BY DELL, 2008, AGAIN  
11:53:11 19 BEFORE ARISTA IS ON THE SCENE. FAMILIAR CISCO STYLE CLI. AND  
11:53:17 20 FULL RANGE OF STANDARD-BASED PROTOCOLS. FAMILIAR CISCO-STYLED  
11:53:22 21 CLI.

11:53:23 22 HP. HERE'S ANOTHER ONE. TRIAL EXHIBIT 6970. WE'VE GOT  
11:53:28 23 MIGRATION TOOLS, HOW TO MIGRATE FROM A CISCO NETWORK TO AN HP  
11:53:33 24 NETWORK.

11:53:34 25 I HEARD CISCO'S COUNSEL TALK ABOUT TARGETING CISCO'S

11:53:37 1 CUSTOMERS. THERE'S NOTHING WRONG WITH GOING AFTER EACH OTHER'S  
11:53:40 2 CUSTOMERS, THAT'S HOW WE OPERATE IN THE UNITED STATES, RIGHT?  
11:53:45 3 CISCO HAS 80 PERCENT MARKET SHARE, SO EVERYBODY IS TRYING TO  
11:53:48 4 GAIN MORE CUSTOMERS. YOU CAN'T WALK AROUND IN NETWORKING  
11:53:51 5 WITHOUT TRIPPING OVER A CISCO CUSTOMER.

11:53:54 6 SO HERE IS HP SAYING, WE HAVE AN INDUSTRY STANDARD CLI  
11:53:59 7 WITH A VERY SIMILAR COMMAND-LINE INTERFACE AND MIGRATION TOOLS.

11:54:03 8 AND WE SAW YESTERDAY -- EXCUSE ME, I THINK IT WAS ON MAYBE  
11:54:09 9 WEDNESDAY, A GREAT EXAMPLE OF HOW HP ADVERTISES, THIS WAS THE  
11:54:13 10 MANUAL THAT MR. VENKATRAMAN TALKED ABOUT, AND WE SAW THIS IN  
11:54:17 11 THEIR OPENING, THEY DO HAVE A PRODUCT COMWARE THAT'S DIFFERENT.

11:54:21 12 BUT TAKE A LOOK AT WHAT THEY SHOW IN THEIR MANUAL, THEY  
11:54:26 13 ARE COMPARING THEIR MAIN ENTERPRISE PRODUCT, THAT'S THE SAME  
11:54:29 14 MARKET THAT CISCO WAS IN, TO CISCO.

11:54:32 15 NOW YOU TELL ME HOW DIFFERENT THOSE ARE. "SHOW FLASH,"  
11:54:36 16 "SHOW VERSION," "SHOW RUN," "SHOW START," "SHOW HISTORY," "SHOW  
11:54:40 17 LOG IN," YOU CAN GO ALL THE WAY DOWN. THE ONLY PERSON THAT  
11:54:45 18 DOESN'T RECOGNIZE THOSE ARE SIMILAR AND DR. ALMEROTH, AND WE  
11:54:48 19 WILL TALK MORE ABOUT HIM IN A MINUTE.

11:54:51 20 THAT'S HP ADVERTISING THIS WAS SO COMMON THAT THE LEADING  
11:54:55 21 INDUSTRY PUBLICATIONS POINTED OUT THAT EVERYBODY WAS COPYING  
11:54:58 22 CISCO.

11:54:59 23 THIS IS A 2007 ARTICLE FROM *NETWORK WORLD*. THIS  
11:55:02 24 *NETWORK WORLD* YOU'VE SEEN SEVERAL ARTICLES THEY DID THE  
11:55:05 25 HEAD-TO-HEAD TEST AND THEY ARE ONE OF THE LEADERS, "APPEALING

11:55:09 1 TO CCIE'S," THAT'S FOLKS THAT ARE CERTIFIED ON CISCO INTERFACE,  
11:55:15 2 "HARDWARE VENDORS COPY CISCO CLI."

11:55:18 3 THIS IS BEFORE ARISTA WAS ON THE MARKET. CISCO'S CLI HAS  
11:55:22 4 BECOME A STANDARD IN THE INDUSTRY WHICH MANY HARDWARE VENDORS  
11:55:25 5 COPY AND PROMOTE WHEN TRYING TO GET INTO CISCO ACCOUNTS.

11:55:31 6 COPY AND PROMOTE. AND OF COURSE, OF COURSE, A COMPANY  
11:55:35 7 LIKE CISCO THAT'S FOLLOWING THE MARKET AND DOING COMPETITIVE  
11:55:39 8 ANALYSIS, THEY KNEW ALL OF THIS.

11:55:41 9 HERE'S A DOCUMENT AND AN ANALYSIS THAT MR. VOLPI TESTIFIED  
11:55:45 10 ABOUT LAST WEEK. INTERNAL TO CISCO 2006. INTERNAL 2006,  
11:55:51 11 TWO YEARS BEFORE ARISTA IS ON THE SCENE, THEY ARE SAYING TO  
11:55:54 12 THEMSELVES, "OUR CLI BECOMES INDUSTRY STANDARD BETWEEN '93 AND  
11:56:00 13 2000." THAT'S THEIR DOCUMENT, THEIR INTERNAL ANALYSIS  
11:56:04 14 DISCUSSED WITH ALL THE SENIOR MANAGERS.

11:56:07 15 AND NOW I WANT TO SHOW SOME ABSOLUTELY CRITICAL TESTIMONY  
11:56:11 16 FROM MR. VOLPI. UNIMPEACHED BY CISCO.

11:56:14 17 CAN I HAVE THIS NEXT SLIDE UP.

11:56:16 18 OKAY. WE ASKED HIM, HE'S RUNNING THE ETHERNET SWITCH  
11:56:20 19 BUSINESS. HE'S RUNNING THE BUSINESS AT CISCO. HE'S REPORTING  
11:56:25 20 TO MR. GIANCARLO WHO IS THE CHIEF TECHNOLOGY OFFICER, AND THEY  
11:56:28 21 REPORT TO MR. CHAMBERS.

11:56:30 22 I ASKED HIM, "WAS THE USE OF A SIMILAR OR VERY SIMILAR  
11:56:34 23 COMMAND LINE LIMITED OR WIDESPREAD?" HE SAID, "ALMOST  
11:56:38 24 EVERYBODY THAT COMPETED WITH US USED A SIMILAR LANGUAGE. SOME  
11:56:43 25 OF THEM WERE VERY, VERY SIMILAR."

11:56:45 1 THIS IS THE MOST SENIOR EXECUTIVE INSIDE CISCO TELLING US  
11:56:49 2 THAT WAY BACK WHEN HE WAS THERE BEFORE HE LEFT IN '07,  
11:56:52 3 EVERYBODY INSIDE KNEW THAT FOLKS WERE USING IT.

11:56:56 4 THEN WHAT? WERE THERE BUSINESS REASONS FOR CISCO NOT TO  
11:57:01 5 OBJECT TO COMPETITORS USING THE SAME OR VERY SIMILAR CLI?

11:57:07 6 HE GAVE A VERY TRUTHFUL STRAIGHTFORWARD ANSWER UN  
11:57:10 7 IMPEACHED, I WOULD SAY THE NOTION OF OTHER PEOPLE USING OUR CLI  
11:57:14 8 IS A DOUBLE EDGED SWORD, HE SAYS, AT THE TIME YOU DIDN'T WANT  
11:57:18 9 EVERYBODY TO JUST DIRECTLY COPY. VERY HONEST.

11:57:23 10 "ON THE OTHER HAND, IT WOULD REINFORCE OUR MARKET  
11:57:26 11 LEADERSHIP BECAUSE CISCO WAS FUNDAMENTALLY THE AUTHOR OF THE  
11:57:29 12 CLI. THEY HAVE BEEN AROUND THE LONGEST."

11:57:33 13 AND THE FACT THAT OTHER PEOPLE WERE USING IT, ALLOWED  
11:57:35 14 CISCO TO PRESENT ITSELF AS THE DE FACTO LEADER AND SAY LOOK,  
11:57:40 15 EVERYONE ELSE IS USING IT. SO IT SORT OF REINFORCED OUR MARKET  
11:57:46 16 LEADERSHIP POSITION.

11:57:47 17 MR. VOLPI TOLD US, THEY MADE A DECISION BACK BEFORE ARISTA  
11:57:52 18 WAS CREATED TO CALL IT A DE FACTO STANDARD AND ALLOW OTHER  
11:57:56 19 FOLKS TO USE IT WHICH THEY DID OVER THE YEARS.

11:57:59 20 LET'S LOOK AT THE NEXT SLIDE. MR. GIANCARLO, HE IS  
11:58:03 21 VOLPI'S BOSS. AGAIN, UN IMPEACHED BY CISCO ON THIS POINT.

11:58:09 22 WHAT IF ANY BUSINESS REASON DID CISCO HAVE FOR NOT CALLING  
11:58:12 23 UP COMPANIES LIKE FOUNDRY AND TELLING THEM NOT TO USE OR COPY  
11:58:15 24 THE CLI?

11:58:18 25 WHAT'S HIS ANSWER? "WELL, AGAIN, IT WAS OUR BELIEF, BASED

11:58:22 1 ON ASSERTIONS WE HAD FROM CISCO MANAGEMENT AND REPEATED OVER AS  
11:58:27 2 WE DISCUSSED SUCH THINGS, THAT THE CLI WAS NOT PROTECTABLE.

11:58:32 3 GIVEN IN THE LATE 90'S, AS I SAID, WE BELIEVE IT WAS NOT  
11:58:37 4 PROTECTABLE. WE SAID, WELL, IF WE CAN'T PROTECT IT, THEN LET'S  
11:58:40 5 USE IT, WE MIGHT AS WELL SAY IT'S A STANDARD. IF OTHERS ARE  
11:58:46 6 USING IT AS WELL, AND CAN CLAIM TO BE, STANDARD AND OPEN, WHICH  
11:58:51 7 IS AN ADVANTAGE UNTO ITSELF."

11:58:53 8 THESE ARE THE TWO MOST SENIOR BUSINESS LEADERS AT CISCO  
11:58:57 9 TELLING YOU EXACTLY WHAT HAPPENED IN THE MARKET.

11:59:00 10 NOW THE ENGINEERS AGREED, THE ENGINEERS AGREED, LET'S LOOK  
11:59:03 11 AT THE NEXT SLIDE. THIS IS MR. KATHAIL. HE TESTIFIED LAST  
11:59:07 12 WEEK, MAYBE THE WEEK BEFORE.

11:59:10 13 "THAT WAS SOMETHING CISCO WAS PERFECTLY SATISFIED WITH,  
11:59:13 14 RIGHT?"

11:59:14 15 "YES."

11:59:14 16 "THAT WAS GOOD FOR CISCO THAT CUSTOMERS COULD GO FEEL AT  
11:59:18 17 HOME ON COMPETITORS'S PRODUCTS, RIGHT?"

11:59:22 18 "YES. CISCO WANTED CUSTOMERS TO FEEL AT HOME ON  
11:59:26 19 COMPETITORS PRODUCTS USING THE SAME STANDARD SET OF COMMANDS."

11:59:31 20 MR. REMAKER.

11:59:33 21 "CISCO WAS HAPPY WITH THE CLI COMMANDS BEING A DE FACTO  
11:59:38 22 INDUSTRY STANDARD BECAUSE THAT WAS CONSISTENT WITH THE CULTURE  
11:59:42 23 OF MAKING CUSTOMERS SUCCESSFUL."

11:59:46 24 "YES, A CONSISTENT CLI MAKES OUR CUSTOMERS SUCCESSFUL."

11:59:49 25 NOW LET ME PAUSE FOR JUST A MINUTE BECAUSE WE HEARD A



11:59:52 1 LITTLE BIT ABOUT HUAWEI.

11:59:53 2 COULD I SEE THE NEXT SLIDE.

11:59:55 3 THE BUSINESS MANAGER RUNNING HUAWEI TESTIFIED, THAT'S  
11:59:59 4 MR. GIANCARLO, THAT HUAWEI WAS ABOUT SOURCE CODE. BUT YOU  
12:00:02 5 DON'T EVEN NEED TO RELY JUST ON MR. GIANCARLO. HUAWEI HAPPENED  
12:00:06 6 IN 2003. 2003. ALL OF THESE STATEMENTS THAT WE'RE TALKING  
12:00:12 7 ABOUT ARE AFTER THE HUAWEI LAWSUIT WAS DONE, RIGHT?

12:00:29 8 (REDACTED). ALL THESE STATEMENTS AND THE STATEMENTS BY  
12:00:31 9 MR. GIANCARLO AND THE STATEMENT BY MR. VOLPI AND ALL OF THESE  
12:00:35 10 DATA SHEETS, THEY POST-DATE HUAWEI. THEY'VE HAPPENED SINCE  
12:00:39 11 THEN. HUAWEI WAS A LAWSUIT ABOUT SOURCE CODE.

12:00:43 12 IN THE HUAWEI CASE, ACTUAL ORIGINAL SOURCE CODE INSIDE THE  
12:00:46 13 SWITCH WAS COPIED, 29,000 LINES OF IT, APPARENTLY. THAT'S  
12:00:53 14 QUITE A BIT. AND AS MR. GIANCARLO SAYS, THE FOCUS WAS ON THEM  
12:00:56 15 STOPPING USING OUR SOURCE CODE.

12:00:59 16 THEN WHAT OTHER EVIDENCE DO YOU HAVE ABOUT WHAT HAPPENED  
12:01:01 17 IN THE MARKET? THIS IS TRIAL EXHIBIT 9049. IT'S -- IT WAS THE  
12:01:07 18 ONE INSTANCE WHEN DR. BLACK WAS ABLE TO GET HIS HANDS ON ALL  
12:01:12 19 THE RELEVANT MANUALS FOR ONE CUSTOMER, AND HE PRESENTED THIS  
12:01:17 20 EXHIBIT TO YOU, IT'S 26 PAGES OF COMMANDS THAT ARE IN COMMON  
12:01:24 21 BETWEEN CISCO AND DELL. 26 PAGES, 1600 COMMANDS.

12:01:30 22 SO DON'T TELL ME THAT SOMEHOW ARISTA IS AN OUTLIER OR  
12:01:34 23 ARISTA IS THE WORST OR ARISTA IS THE MOST BLATANT, THAT'S  
12:01:38 24 BALONEY. AND DR. BLACK'S WORK PROVES IT. EVEN WHEN HE LIMITED  
12:01:42 25 HIMSELF TO JUST THE 500 COMMANDS ASSERTED HERE, HE FOUND

12:01:46 1 HUNDREDS OF THEM THE SAME AT D-LINK, HP, JUNIPER, JUNOS-E, AND  
12:01:53 2 A DOZEN OTHERS, RIGHT? THEY ARE ALL UP THERE USING THE SAME  
12:01:58 3 BASIC SETS OF COMMANDS. SO THAT'S TX 9049.

12:02:04 4 NOW, THE MARKET SAID THE SAME THING. HERE'S MR. SHAFER.  
12:02:07 5 YOU GUYS KNOW BY NOW JUNOS HAS -- JUNIPER HAS TWO DIFFERENT  
12:02:12 6 PRODUCTS. ONE PRODUCT ADDRESSES A DIFFERENT MARKET, AND  
12:02:15 7 ANOTHER PRODUCT ADDRESSES A MARKET FOR ENTERPRISE CUSTOMERS.

12:02:19 8 IN THAT MARKET, THEY WERE MARKETING JUNOS-E. WHAT DID  
12:02:22 9 MR. SHAFER SAY? "THE PRODUCT THAT JUNIPER ACQUIRED AND SOLD,  
12:02:27 10 THAT PRODUCT USED HUNDREDS OF THE SAME CLI COMMANDS THAT ARE  
12:02:32 11 SUPPORTED BY THE CISCO?"

12:02:34 12 "YES. IT SUPPORTED THE SAME MODES AND THE SAME PROMPTS.  
12:02:38 13 YES."

12:02:39 14 THAT'S JUNIPER, MR. SHAFER, TESTIFYING ABOUT JUNOS-E.

12:02:44 15 LET'S LOOK AT WHAT DELL SAYS. YOU HAD MR. GAVIN CATO  
12:02:47 16 HERE, HE WAS ON VIDEOTAPE, NOT LIVE, FROM DELL.

12:02:51 17 "ARE YOU AWARE OF OTHER VENDORS WITH WHOM DELL'S CLI  
12:02:54 18 COMMANDS OVERLAP?"

12:02:56 19 AND WE KNOW DELL HAS 1600, OR IN THAT BALLPARK, THAT  
12:03:00 20 OVERLAP. "DO YOU KNOW ANYBODY ELSE?"

12:03:01 21 "OH, YEAH, OH, YEAH. ARISTA, JUNIPER, EXTREME,  
12:03:07 22 ENTERASYS, ANYBODY THAT USES THE BROADCOM POWERCONNECT SOFTWARE  
12:03:11 23 OR LEVEL 7, EVERYONE OUT THERE WITH CISCO'S KNOWLEDGE AND  
12:03:19 24 ACQUIESCENCE FOR THEIR OWN BENEFIT USING THE SAME COMMAND."

12:03:27 25 LET'S LOOK AT THE NEXT ONE. THIS IS MR. VENKATRAMAN, HE'S

12:03:32 1 HEWLETT-PACKARD. SO BETWEEN THE THREE WE'VE COVERED JUNIPER,  
12:03:35 2 DELL, HEWLETT-PACKARD, THREE OF THE BIGGEST COMPETITORS.

12:03:36 3 "WOULD YOU BE SURPRISED TO LEARN THAT THE HP PROVISION ON  
12:03:39 4 THE LEFT SIDE, HAS HUNDREDS OF OVERLAPPING COMMANDS WITH  
12:03:42 5 CISCO?"

12:03:42 6 "NO, MOST VENDORS HAVE OVERLAPPING NAME AND SYNTAX."

12:03:48 7 MOST VENDORS. MOST VENDORS. THESE ARE PEOPLE WITH NO AXE  
12:03:52 8 TO GRIND. THEY ARE OUT THERE, THEY WERE CALLED BY BOTH  
12:03:55 9 PARTIES. THEY CAME IN AS THIRD PARTIES TO LET YOU KNOW WHAT'S  
12:03:59 10 HAPPENING IN THE MARKET, ON REBUTTAL.

12:04:01 11 NOW WAS ARISTA'S USE OF THE CLI A CISCO-LIKE CLI A  
12:04:07 12 SURPRISE OR A SECRET? OH, NO, OH, NO.

12:04:12 13 TAKE A LOOK AT THE BOTTOM. THE TOP OF THE SLIDE WE SAW  
12:04:15 14 EARLIER, THAT'S WHAT WAS HAPPENING AT ARISTA. IN 2009, CISCO  
12:04:19 15 BUYS A SWITCH, ALL RIGHT. TX 9079, THAT'S THAT REALLY BORING  
12:04:25 16 INTERROGATORY I READ YOU ABOUT TWO WEEKS AGO, BUT IT'S  
12:04:28 17 IMPORTANT BECAUSE WHAT IT SHOWS -- IT'S 9077, I APOLOGIZE,  
12:04:35 18 9077. IT'S A MULTI-PAGE EXHIBIT SHOWING ALL THE SWITCHES FROM  
12:04:39 19 ARISTA THAT CISCO BOUGHT. THAT'S WHY THEIR COUNSEL STOOD UP  
12:04:43 20 AND SAID OH, WE ARE NOT COMPLAINING ABOUT THAT. THAT'S BECAUSE  
12:04:47 21 THEY BOUGHT MORE THAN A DOZEN AND TESTED THEM STARTING IN '09.  
12:04:51 22 THEY TESTED THEM. THEY USED THE CLI. THEY KNEW WHAT THE CLI  
12:04:57 23 DID. TWO YEARS LATER THEY WROTE A 20-PAGE RESPONSE TO THAT  
12:05:01 24 *NETWORK WORLD* ARTICLE. AND TO GET TO THAT, THEY HAD TO STUDY  
12:05:05 25 AGAIN.

1 THEN IN 2011, MR. JIANDANI CREATED THE TIGER TEAM, SOME 30  
2 ENGINEERS FOCUSED ONLY ON ARISTA. DO YOU THINK THEY OVERLOOKED  
3 THE CLI? I KIND OF DOUBT IT.

4 2013, MR. CHAMBERS INVESTS A BILLION DOLLARS IN INSIEME,  
5 DO YOU THINK HE DID THAT WITHOUT KNOWING EVERYTHING ABOUT  
6 ARISTA'S PRODUCTS? HE TOLD THE PRESS HE KNEW EVERYTHING ABOUT  
7 IT AND HE KNEW EVERY ACCOUNT THEY WERE IN.

8 AND THEN IN 2013 MS. JIANDANI SAYS, WAIT A MINUTE, CALL TO  
9 ACTION, WE'VE GOT TO PREVENT THE IPO, THESE GUYS ARE GETTING  
10 SERIOUS. WE'VE GOT TO THE PREVENT THE IPO. 2013.

11 2014, LAWSUIT IS FILED WITH ABSOLUTELY NO ADVANCE  
12 INVITATION TO TALK, CEASE AND DESIST LETTER, NOTHING. THEY  
13 TREATED HUAWEI BETTER. MR. GIANCARLO MADE TWO TRIPS TO CHINA  
14 TO NEGOTIATE WITH HUAWEI, THAT ACCORDING TO THEM, SOLD SOURCE  
15 CODE.

16 THEY SUED ARISTA WITHOUT SO MUCH AS A PHONE CALL, A  
17 LETTER, NOT A THING.

18 AND IF THERE'S ANY DOUBT THAT CISCO WAS FULLY AWARE,  
19 STARTING IN '09, THAT ARISTA WAS USING A CISCO-LIKE  
20 COMMAND-LINE INTERFACE, TESTIMONY THAT YOU HEARD IN THE TRIAL  
21 FROM MR. GOURLAY, PUTS THAT TO BED.

22 (WHEREUPON, A VIDEO WAS PLAYED IN OPEN COURT.)

23 MR. VAN NEST: YOUR HONOR, THIS WOULD BE A GOOD TIME  
24 TO TAKE OUR NOON BREAK.

25 THE COURT: OKAY. LET'S DO THAT.

12:07:32 1 LET'S TAKE OUR USUAL HOUR BREAK AND COME BACK AT 1:10.

12:07:37 2 (RECESS FROM 12:07 P.M. UNTIL 1:10 P.M.)

01:10:49 3 THE COURT: WE ARE BACK ON THE RECORD AND ALL OF OUR  
01:18:25 4 JURORS ARE HERE.

01:18:26 5 MR. VAN NEST, WOULD YOU LIKE TO CONTINUE?

01:18:28 6 MR. VAN NEST: I WOULD YOUR HONOR, THANK YOU VERY  
01:18:30 7 MUCH.

01:18:32 8 **CLOSING ARGUMENTS BY MR. VAN NEST (CONTINUED)**

01:18:34 9 WELCOME BACK, EVERYONE, FROM LUNCH, AND THANK YOU AGAIN  
01:18:36 10 FOR BEING SO PROMPT AND DILIGENT.

01:18:38 11 LET'S GO BACK TO MR. GOURLAY. THERE WERE COMMENTS THIS  
01:18:40 12 MORNING BY CISCO'S COUNSEL ABOUT BLATANT COPYING. BLATANT  
01:18:45 13 COPYING OF THE CLI.

01:18:47 14 WE NOW KNOW FROM MR. GOURLAY'S TESTIMONY THAT IF THAT'S  
01:18:50 15 SO, IT WAS KNOWN TO CISCO IN 2009. HE JUST TESTIFIED THAT HE  
01:18:56 16 LOOKED AT A SWITCH IN THE TESTING LAB AT CISCO IN '09, AND HE  
01:19:00 17 CONCLUDED THAT ARISTA WAS USING A CLI THAT HAD A CONSISTENT  
01:19:04 18 LOOK AND FEEL TO THE ONE USED BY, NOT JUST CISCO, BUT FOUNDRY,  
01:19:10 19 EXTREME, JUNIPER, AND A HOST OF OTHER NETWORK PROVIDERS.

01:19:17 20 WHY DIDN'T ALARM BELLS GO OFF BACK THEN? WHY WASN'T IT  
01:19:24 21 UNTIL 2014 THAT A LAWSUIT WAS FILED. WELL, THE TESTIMONY OF  
01:19:27 22 MR. VOLPI AND MR. GIANCARLO EXPLAINS IT PERFECTLY. THEY MADE A  
01:19:31 23 BUSINESS DECISION AT CISCO NOT TO PROTECT THE CLI BUT BY  
01:19:36 24 ENCOURAGING OTHERS TO USE IT BY CALLING IT AN INDUSTRY  
01:19:39 25 STANDARD.

01:19:39 1 WHY? CUSTOMERS LIKED THAT BETTER AND IT ALLOWED CISCO TO  
01:19:43 2 SAY WE ARE THE LEADER. OBVIOUSLY, THEY DID THAT BECAUSE,  
01:19:49 3 HERE'S THE SLIDE YOU SAW THIS MORNING ON THE BOTTOM, OH, ALL  
01:19:53 4 THAT BLATANT COPYING BY ARISTA.

01:19:55 5 LOOK AT DELL. DELL IS UP THERE AT 1600 COMMANDS THAT ARE  
01:19:59 6 THE SAME. THIS DOESN'T FIT TOGETHER. IT DOESN'T FIT TOGETHER  
01:20:03 7 THAT SOMEHOW CISCO WASN'T AWARE OF THIS UNTIL 2014. WITH ALL  
01:20:08 8 OF THESE INDUSTRY PLAYERS USING THE COMMANDS, AND CISCO TESTING  
01:20:12 9 THE SWITCHES IN THEIR LAB, THEY HAD TO KNOW ALL OF THIS.

01:20:16 10 AND THE ONLY REASONABLE EXPLANATION THAT HE KNOW HAPPENED  
01:20:20 11 IN THE MARKET, WHICH IS THEY CONTINUED TO PROMOTE THE CLI AS AN  
01:20:25 12 INDUSTRY STANDARD OVER, AND OVER, AND OVER, AND THEY MADE A  
01:20:28 13 BUSINESS DECISION NOT TO STOP IT.

01:20:30 14 NOW THAT'S RELEVANT TO TWO VERY IMPORTANT CONCEPTS.

01:20:34 15 ONE, IT MEANS THE USE WAS A FAIR USE, BECAUSE IT'S A USE  
01:20:38 16 THAT CISCO ENCOURAGED AND UNDERSTOOD WAS REASONABLE AND  
01:20:44 17 BENEFITTED FROM THEMSELVES.

01:20:45 18 AND IT ALSO GOES TO ABANDONMENT. THEY ABANDONED THE CLAIM  
01:20:49 19 FOR COPYRIGHT ON THESE CLI'S WHEN THEY DECIDED NOT TO STOP IT  
01:20:53 20 TO GO FORWARD, PROMOTE IT AS INDUSTRY STANDARD, AND TOLERATE  
01:20:58 21 ITS USE BY OTHERS.

01:20:59 22 ALL OF THIS HAPPENED YEARS AFTER THE HUAWEI LAWSUIT, THEY  
01:21:02 23 WANT TO TALK SO MUCH ABOUT. ALL OF THIS WE ARE TALKING ABOUT  
01:21:05 24 HAPPENED AFTER HUAWEI.

01:21:06 25 OKAY. LET'S TALK ABOUT COPYING AND COPYRIGHT

01:21:11 1 INFRINGEMENT.

01:21:13 2 KEY POINT, COPYING UNPROTECTED ELEMENTS OF THE CLI IS NOT  
01:21:18 3 INFRINGEMENT. IT'S NOT ENOUGH TO PROVE COPYING. THE COPYING  
01:21:23 4 HAS TO BE OF SOMETHING THAT'S ACTUALLY PROTECTABLE.

01:21:26 5 THE LAW PERMITS COPYING OF FEATURES THAT ARE NOT  
01:21:30 6 PROTECTABLE, EITHER BECAUSE THEY ARE NOT PROTECTABLE AS A  
01:21:33 7 MATTER OF LAW OR BECAUSE THEY ARE NOT ORIGINAL OR BECAUSE THEY  
01:21:38 8 ARE NOT CREATIVE.

01:21:40 9 HERE'S THE JURY INSTRUCTION 36. VERY IMPORTANT. "THEY  
01:21:43 10 HAVE THE BURDEN TO PROVE BY A PREPONDERANCE THAT ARISTA COPIED  
01:21:48 11 ORIGINAL PROTECTED ELEMENTS FROM CISCO'S WORK."

01:21:52 12 SO THE FACT THAT EVERYBODY, INCLUDING ARISTA, WAS USING  
01:21:56 13 SOME OF THE SAME COMMANDS, THAT'S NOT COPYRIGHT INFRINGEMENT  
01:22:00 14 UNLESS WHAT'S BEING COPIED IS PROTECTED.

01:22:04 15 OKAY. LET'S TAKE A LOOK AT THE NEXT ONE WHICH IS VERY  
01:22:07 16 IMPORTANT. JURY INSTRUCTION 39.

01:22:09 17 JUDGE FREEMAN HAS GIVEN US THE INSTRUCTIONS OF THINGS THAT  
01:22:13 18 ARE NOT PROTECTABLE, THINGS YOU CAN'T PROTECT, LET'S LIST THEM:

01:22:17 19 ONE, ANY SINGLE MULTIWORD COMMAND.

01:22:20 20 LET ME PAUSE RIGHT THERE. ALL THAT TESTIMONY YOU HEARD  
01:22:22 21 FROM MR. REMAKER AND MR. LOUGHEED ABOUT HOW CREATIVE THEY WERE  
01:22:25 22 IN CREATING EACH OF THESE MULTIWORD COMMANDS, EVEN IF IT WERE  
01:22:30 23 TRUE, THAT'S NOT PROTECTABLE. THOSE AREN'T PROTECTABLE.

01:22:34 24 COMMAND HIERARCHIES, ALSO NOT PROTECTABLE. THE TESTIMONY  
01:22:36 25 FROM DR. ALMEROOTH AND MR. LOUGHEED, ALL OF THESE WONDERFUL

01:22:42 1 HIERARCHIES, NOT PROTECTABLE.

01:22:45 2 SPECIFIC MODES AND PROMPTS, NOT PROTECTABLE.

01:22:49 3 USE OF COMMAND SYNTAX, THAT'S HOW ALL OF THEIR COMMANDS  
01:22:53 4 ARE WRITTEN, A VERB LIKE "SHOW," OR "CLEAR," OR "CONFIGURE,"  
01:22:57 5 WITH AN OBJECT LIKE "BGP," OR "IP," THAT'S COMMAND SYNTAX, NOT  
01:23:04 6 PROTECTABLE.

01:23:05 7 FUNCTIONS, NOT PROTECTABLE. OBVIOUSLY THAT'S A HUGE  
01:23:08 8 POINT.

01:23:08 9 HOW THE DEVICE ACTUALLY OPERATES, NOT PROTECTED.

01:23:13 10 USING THESE FEATURES, NOT PROTECTED. ALL THEY'VE GOT IS A  
01:23:17 11 CLAIM ABOUT THE LABELS ON THE KNOBS THAT DR. BLACK TALKED  
01:23:20 12 ABOUT, BUT NOT EVEN THAT.

01:23:23 13 INDIVIDUAL HELP DESCRIPTION PHRASES, NOT PROTECTABLE.

01:23:27 14 SO WHAT DOES THIS MEAN? THIS MEANS THAT ALL THIS  
01:23:31 15 TESTIMONY YOU GOT ABOUT THE COMMANDS, THAT'S NOT ON POINT.  
01:23:36 16 THEIR CLAIM NOW IS ONLY THAT THEY HAVE A COMPILATION OF ALL THE  
01:23:42 17 COMMANDS IN IOS, A COMPILATION -- THAT'S THE COLLECTION OF ALL,  
01:23:47 18 16,000. THEY ARE SAYING THAT'S WHAT THEY CAN PROTECT. OR IN  
01:23:51 19 THE CASE OF THESE HELP DESCRIPTIONS, ALL OF THOSE, THERE'S  
01:23:57 20 52,000 HELP DESCRIPTIONS, 52,000 HELP DESCRIPTIONS, OR ALL THE  
01:24:00 21 COMMAND OUTPUTS, THERE'S THOUSANDS OF THOSE TOO.

01:24:04 22 THEIR CLAIM IS NOW LIMITED TO THESE COLLECTIONS. WHY IS  
01:24:07 23 THAT IMPORTANT? ARISTA DIDN'T COPY THE COMPILATION, WE KNOW  
01:24:11 24 THAT. THEY ARE ONLY ACCUSING ARISTA OF USING 500 OF THE  
01:24:16 25 THOUSANDS OF COMMANDS IN THE SYSTEM.



01:24:18 1 SO IT'S CRYSTAL CLEAR THAT ARISTA DIDN'T COPY THE  
01:24:22 2 COMPILATION, THEIR CLAIM NOW IS LIMITED TO THESE COMPILATIONS.

01:24:26 3 SO WHAT HAVE THEY PROVED THERE? DID ANYBODY COME IN AND  
01:24:30 4 TESTIFY ABOUT HOW THE WHOLE ARRANGEMENT OF COMMANDS WORKED  
01:24:33 5 WELL? NO. YOU DIDN'T HEAR ANY OF THAT. OR WHY ALL THE HELP  
01:24:37 6 DESCRIPTION COMPILATIONS IS A PROTECTABLE CREATIVE THING?

01:24:41 7 ALL THESE ARE, ARE COLLECTIONS OF EITHER COMMANDS OR HELP  
01:24:45 8 DESCRIPTIONS THAT THEY'VE WRITTEN OVER MANY YEARS AND STORED IN  
01:24:48 9 THEIR MANUALS AND ELSEWHERE. THEY DIDN'T EVEN SHOW YOU AN  
01:24:53 10 EXAMPLE OF WHAT A COMPILATION LOOKED LIKE, NOTHING LIKE THAT.

01:24:56 11 AND CRITICALLY, THEY ARE NOT CLAIMING THAT THERE'S  
01:24:59 12 SOMETHING UNIQUE ABOUT THE 506 THEY ARE CLAIMING ABOUT, THAT  
01:25:03 13 THERE'S SOME KIND OF UNIFIED THING OR THAT IT HAS A LIFE  
01:25:07 14 OUTSIDE THIS LAWSUIT, THOSE ARE JUST THE COMMANDS THEY FOUND  
01:25:10 15 WHEN THEY WENT THROUGH THE CLI THAT WERE SIMILAR TO THEIRS, IN  
01:25:14 16 SOME CASES IDENTICAL TO THEIRS, RIGHT?

01:25:17 17 IN OTHER WORDS, THEY DON'T HAVE ANY EVIDENCE BEFORE YOU  
01:25:20 18 THAT THESE 506 COMMANDS REPRESENT ANYTHING OUTSIDE OF THIS  
01:25:26 19 LAWSUIT, ANYTHING LIKE A UNIFIED STRUCTURE OR SOMETHING  
01:25:29 20 SIGNIFICANT OR SOMETHING SPECIALLY CREATIVE OR SOMETHING  
01:25:33 21 PROTECTABLE, RIGHT?

01:25:35 22 AND DR. BLACK DID THAT. WE ASKED HIM TO LOOK, OF THE 506  
01:25:39 23 ASSERTED COMMANDS, IS THERE ANY PATTERN YOU FOUND AMONG THOSE?  
01:25:43 24 HE SAYS, "I MEAN, YOU CAN LOOK THROUGH THE LIST AND I CAN'T  
01:25:47 25 DISCERN ANY MEANINGFUL PATTERN. IT'S MORE OR LESS AN ARBITRARY

01:25:52 1 LIST, FROM WHAT I CAN SEE, OTHER THAN PERHAPS THEY SHARE A  
01:25:56 2 COMMONALITY WITH ARISTA."

01:25:59 3 YOU WOULD SEE THE SAME KIND OF LIST OF 1600, IF WE WERE  
01:26:02 4 TALKING ABOUT DELL, OR MAYBE 7 OR 800 IF WE WERE TALKING ABOUT  
01:26:08 5 JUNOS-E, OR WHO KNOWS HOW MANY IF WE WERE TALKING ABOUT HP,  
01:26:12 6 EXTREME, BROCADE OR THE OTHERS, RIGHT? THERE'S NOTHING  
01:26:15 7 PROTECTABLE ABOUT THAT COMPILATION.

01:26:18 8 NOW, I KNOW WHAT THEIR ANSWER WILL BE, WELL, YOU TOOK WHAT  
01:26:22 9 YOU NEEDED. AND GHEE, MR. SADANA SAID "CORE COMMANDS." WHAT  
01:26:25 10 MR. SADANA IS TALKING ABOUT IS FOR THOSE ROUTINE UTILITY  
01:26:29 11 COMMANDS AND FUNCTIONS THAT ANY SWITCH HAS, THE INDUSTRY HAS  
01:26:34 12 ADOPTED A COMMON LANGUAGE FOR THOSE.

01:26:37 13 THAT DOESN'T EVEN ADDRESS ALL THE NEW FEATURES AND THE NEW  
01:26:41 14 FUNCTIONALITY IN THE ARISTA SWITCHES, RIGHT? THE CORE COMMANDS  
01:26:44 15 THAT MR. SADANA IS TALKING ABOUT, THOSE ARE UTILITY FUNCTIONS  
01:26:48 16 THAT EXIST IN ANY SWITCH. AND ALL THE NETWORK SWITCH PROVIDERS  
01:26:53 17 HAVE THOSE AND THEY ARE ALL USING THE SAME SET OF THOSE CORE  
01:26:57 18 COMMANDS. NOTHING UNIQUE ABOUT THAT.

01:26:59 19 NOW, I WOULD SUBMIT THAT EVEN IF YOU GO TO THE MULTIWORD  
01:27:03 20 COMMANDS, THOSE AREN'T ORIGINAL EITHER.

01:27:05 21 LET'S GO TO THE NEXT ONE.

01:27:09 22 155 OF THE 500 ARE SHOW COMMANDS. THE WORD "SHOW," WHICH  
01:27:14 23 IS NOT UNIQUE, OR ORIGINAL TO THEM, AND FOLLOWED BY A NOUN.

01:27:21 24 ONE OF THE OTHER THINGS THAT JUDGE FREEMAN'S INSTRUCTION  
01:27:23 25 SAYS, AND I FORGOT TO PUT THIS ON THE SLIDE, WAS THE IDEA OR

01:27:27 1 METHOD OF GROUPING OR CLUSTERING COMMANDS UNDER COMMON INITIAL  
01:27:31 2 WORDS LIKE SHOW OR IP. NOT PROTECTABLE. AGAIN, NOT  
01:27:36 3 PROTECTABLE.

01:27:36 4 "SHOW" HAS BEEN AROUND FOREVER, AS MR. LOUGHEED ADMITTED,  
01:27:40 5 155 OF THESE ARE "SHOW" COMMANDS. HE WORKED ON A NUMBER OF  
01:27:43 6 SYSTEMS AT STANFORD, THIS IS JUST ONE, THAT HAD A "SHOW"  
01:27:46 7 COMMAND. YES, IT DID, IT HAD A "SHOW" COMMAND, HE TESTIFIED  
01:27:51 8 THERE WERE OTHERS AS WELL, WHILE HE WORKED AT STANFORD.

01:27:54 9 HE ALSO TESTIFIED THAT SOME OF THE COMMANDS HE SIMPLY  
01:27:57 10 COPIED FROM OTHER SYSTEMS.

01:27:59 11 REMEMBER WE FOUND A MANUAL IN HIS POSSESSION THAT HAD 7 OR  
01:28:03 12 8 OF THESE COMMANDS, VERBATIM IN THERE, HE SAID THAT'S A  
01:28:07 13 COINCIDENCE, OKAY. BUT IN THIS CASE, IN THE CISCO CLI, HE USED  
01:28:11 14 A MULTIWORD COMMAND, HE HAD PREVIOUSLY USED AT ANOTHER COMPANY.

01:28:18 15 AGAIN, THESE ARE ROUTINE COMMON DESCRIPTIONS THAT INDUSTRY  
01:28:22 16 HAS ADOPTED FOR USE AND HAVE BEEN IN USE FOR YEARS.

01:28:26 17 ALL RIGHT. I WANT TO TALK ABOUT TWO LEGAL CONCEPTS THAT  
01:28:28 18 ARE A BIG PART OF YOUR CONSIDERATION OF INFRINGEMENT. MERGER  
01:28:33 19 AND SCÈNES À FAIRE. WHAT ARE THEY? THIS IS RELATED TO THIS  
01:28:36 20 CONCEPT OF PROTECT.

01:28:41 21 MERGER SAYS IF THERE'S ONLY A FEW WAYS TO EXPRESS  
01:28:45 22 SOMETHING, YOU CAN'T PROTECT IT. IT CAN BE USED BY OTHERS.

01:28:47 23 WHY IS THAT? BECAUSE IF WE ARE TALKING ABOUT DESCRIBING  
01:28:50 24 SOMETHING LIKE THE INTERNET PROTOCOL, IP, WHICH HAS BEEN AROUND  
01:28:55 25 AND IN USE FOR YEARS, IT'S NOT RIGHT FOR ONE AUTHOR TO HAVE

01:28:59 1 CONTROL OF THAT. RIGHT? DO WE WANT 40 DIFFERENT NETWORK  
01:29:02 2 SWITCH VENDORS TO HAVE TO COME UP WITH A DIFFERENT WAY TO SAY  
01:29:06 3 IP? OF COURSE NOT.

01:29:07 4 SO THIS MERGER CONCEPT IS IMPORTANT AS PART OF COPYRIGHT  
01:29:11 5 INFRINGEMENT. IF THERE'S ONLY A FEW WAYS TO DO IT, IT'S NOT  
01:29:15 6 PROTECTABLE. THAT'S RELATED TO SCÈNES À FAIRE.

01:29:18 7 SCÈNES À FAIRE MEANS COMMONLY USED TOOLS OF THE TRADE,  
01:29:22 8 THINGS THAT FOLKS USE OVER AND OVER. AND THIS ONE SAYS, IF  
01:29:26 9 THERE WERE EXTERNAL FACTORS THAT LIMIT YOUR CHOICE, YOU CAN'T  
01:29:30 10 PROTECT THE PRODUCT OF THAT.

01:29:32 11 AGAIN, THESE COMMANDS ARE ALL DESCRIBING FEATURES THAT ARE  
01:29:39 12 INDUSTRY PROTOCOLS THAT HAVE BEEN PUBLISHED IN PROTOCOL  
01:29:42 13 DOCUMENTS AND KNOWN BY NETWORK ENGINEERS FOR YEARS.

01:29:45 14 SO THE IDEA HERE IS, IF YOU FIND, WHICH THE EVIDENCE FULLY  
01:29:48 15 SUPPORTS AND WE WILL ROLL THROUGH IT IN A MINUTE, IF YOU FIND  
01:29:52 16 THAT THERE WERE VERY FEW CHOICES AND THEY WERE LIMITED AND  
01:29:56 17 THERE'S ONLY A FEW WAYS TO SAY SOMETHING THAT'S ALREADY IN  
01:30:00 18 EXISTENCE AND ALREADY BEEN APPROVED, THE PRACTICAL REALITIES OF  
01:30:03 19 COMPUTER PROGRAMMING MEAN YOU CAN'T PROTECT STUFF LIKE "SHOW  
01:30:10 20 INTERFACE" OR "SHOW IP ROUTE" OR EVEN SOME OF THE MORE  
01:30:14 21 COMPLICATED ONES, WHICH AGAIN, COME RIGHT FROM THE STANDARDS  
01:30:19 22 THEMSELVES.

01:30:20 23 LET'S GO TO THIS NEXT ONE. HERE'S MY POINT. WE DID THIS  
01:30:24 24 WITH DR. ALMEROOTH.

01:30:25 25 ON THE LEFT ARE SOME OF THE COMMANDS THEY'RE ASSERTING

01:30:28 1 "ROUTER OSPF," "ROUTER ID," "SHOW IP OSPF." OSPF MEANS OPEN  
01:30:33 2 SHORTEST PATH FIRST.

01:30:34 3 AND I'VE GOT AN EXHIBIT NUMBER THERE, IT'S TX 5038. HERE  
01:30:41 4 IT IS. THAT'S A 40 OR 50-PAGE DOCUMENT, THE INDUSTRY CAME  
01:30:45 5 TOGETHER AND CREATED IT. IT EXISTED BEFORE ANY OF THESE  
01:30:48 6 COMMANDS THAT CISCO IS CLAIMING DID.

01:30:50 7 AND WHAT'S THE IDEA? THE IDEA IS THE INDUSTRY CALLS IT  
01:30:55 8 OSPF, THEY HAVE ALREADY ADOPTED THAT TERM. SO ARE WE GOING TO  
01:30:59 9 GIVE CISCO THE EXCLUSIVE RIGHT TO USE THAT? OF COURSE NOT.  
01:31:03 10 THEN THE SECOND GUY HAS TO SPELL IT OUT, AND THE THIRD GUY HAS  
01:31:07 11 TO FIND ANOTHER WORD, AND THE FOURTH, AND THE FIFTH AND THE  
01:31:09 12 SIXTH. YOU COULD SEE HOW RIDICULOUS THAT WOULD BE. CRAZY.

01:31:14 13 NOT ONLY THAT, I'VE GOT IN GREEN, THE TIMES OSPF IS USED.  
01:31:18 14 BUT YOU JUST GO TO PAGE 3 OF THIS THING. DR. ALMEROOTH DIDN'T  
01:31:22 15 LIKE THIS ONE BIT, BUT PAGE 3, I'VE GOT IT UP THERE ON THE  
01:31:25 16 SCREEN, IT'S GOT A LOT OF DEFINED TERMS THAT YOU USE WITH OSPF.  
01:31:30 17 "ROUTER," THAT'S DEFINED TERM, "ROUTER ID," "INTERFACE,"  
01:31:35 18 "NEIGHBORING," "HELLO PROTOCOL," "HELLO INTERVAL" IS ON THE  
01:31:38 19 NEXT PAGE. THEY ARE ALL DEFINED TERMS.

01:31:41 20 LET'S GO BACK -- I DON'T HAVE A SLIDE ON IT, MR. DAHM, I'M  
01:31:45 21 SORRY.

01:31:46 22 BUT YOU CAN GO THROUGH HERE AND THEY ARE ALL THE SAME.  
01:31:48 23 LET'S TAKE A LOOK AT A LONGER ONE RIGHT ON THIS PAGE, "SHOW  
01:31:52 24 IP." "SHOW" COMMONLY USED, "IP" MEANS INTERNET PROTOCOL.  
01:31:58 25 THERE'S A PROTOCOL JUST LIKE THIS FOR IP, AND WHAT'S IT CALLED?

01:32:01 1 IP.

01:32:01 2 OSPF RUNS OVER THE IP PROTOCOL, THAT'S WHY THEY ARE

01:32:04 3 TOGETHER. AND "INTERFACE" IS A DEFINED TERM.

01:32:07 4 THIS HAPPENS OVER, AND OVER, AND OVER IN THESE 500

01:32:10 5 COMMANDS, WHICH IS WHY THEY ARE JUST ROUTINE, NOT PROTECTABLE,

01:32:14 6 AND NOT ORIGINAL.

01:32:16 7 NEXT SLIDE.

01:32:17 8 HERE'S ANOTHER ONE. IGMP, THAT'S ANOTHER ONE. AND THAT'S

01:32:21 9 IN TX 6877, I WENT OVER THAT WITH DR. ALMEROOTH, INTERNET GROUP

01:32:27 10 MANAGEMENT PROTOCOL. RIGHT IN THE TITLE, THAT GREEN PULLOUT IS

01:32:31 11 THE TITLE OF THE PROTOCOL. IT USES IGMP. THE INDUSTRY HAS

01:32:36 12 COME TOGETHER AND DECIDE THAT'S A SUITABLE TERM TO USE.

01:32:39 13 NOW, ARE YOU REQUIRED TO USE IT? NO. I MEAN, YOU ARE NOT

01:32:43 14 FORCED TO USE IT. BUT SINCE THE INDUSTRY IS USING IT, AND

01:32:49 15 SINCE THE IDEA IS WE ARE GOING TO SUPPORT THAT PROTOCOL IN OUR

01:32:52 16 SWITCH, YOU WANT A NETWORK ENGINEER TO BE FAMILIAR WITH IT.

01:32:56 17 SO LOOK AT THESE ONES, THESE ARE LONGER. "QUERY

01:32:59 18 INTERVAL." "STARTUP-QUERY INTERVAL." "START-UP QUERY COUNT,"

01:33:03 19 IF IT WERE UP TO DR. ALMEROOTH, NONE OF US WOULD EVER KNOW THAT

01:33:09 20 THESE CAME DIRECTLY, WORD-FOR-WORD, AS PHRASES OUT THE

01:33:13 21 PROTOCOL.

01:33:13 22 HE WANTED TO PRETEND THAT THIS WAS THE CREATIVE GENIUS OF

01:33:16 23 SOMEONE CREATING THESE COMMANDS. BALONEY. THESE ALL COME

01:33:19 24 RIGHT FROM THE DEFINED TERMS.

01:33:19 25 NEXT PAGE, PLEASE.

01:33:21 1 EVEN THE LONG ONES. "LAST MEMBER QUERY INTERVAL," THAT'S  
01:33:25 2 A DEFINED TERM IN THIS PROTOCOL. "LAST MEMBER QUERY COUNT." A  
01:33:29 3 DEFINED TERM IN THIS PROTOCOL.

01:33:34 4 NOW WE SPENT QUITE A BIT OF TIME ON THAT WITH  
01:33:37 5 DR. ALMEROTH, AND I'M NOT GOING TO REPEAT IT ALL HERE, BUT I  
01:33:40 6 WILL SHOW ON THIS NEXT SLIDE, THERE ARE A LOT OF PROTOCOLS, AND  
01:33:42 7 YOU CAN'T FIND A COMMAND IN HERE THAT DOESN'T COME FROM ONE OR  
01:33:46 8 THE OTHER OF THESE IN SOME WAY.

01:33:49 9 "SNMP" MEANS SIMPLE NETWORK MANAGEMENT PROTOCOL. "IPV6,"  
01:33:54 10 INTERNET PROTOCOL VERSION SIX. "ARP" ON THE RIGHT, ADDRESS  
01:33:58 11 RESOLUTION PROTOCOL. THESE ARE ALL STANDARD PROTOCOLS, I HAVE  
01:34:03 12 THE TX NUMBERS, AND THE IDEA IS THAT FOLKS USE THEM BECAUSE  
01:34:09 13 THEY ARE WHAT THE INDUSTRY HAS DECIDED TO USE TO DESCRIBE THAT  
01:34:14 14 PROTOCOL.

01:34:14 15 HERE'S WHAT MR. CATO SAID, THIS WAS ON VIDEO ALSO. AND  
01:34:19 16 HERE'S THE REAL IDEA, HE'S TALKING ABOUT A VLAN, THAT'S NOT A  
01:34:23 17 PROTOCOL, BUT IT'S A FEATURE. IT MEANS "VIRTUAL LOCAL AREA  
01:34:28 18 NETWORK." WHAT HE'S SAYING IS IF I PUT A VLAN IN MY SWITCH, IF  
01:34:32 19 I SUPPORT IT, THEN IN ORDER FOR THE NETWORK FOLKS TO UNDERSTAND  
01:34:36 20 WHAT I'VE GOT, I'VE GOT TO USE VLAN IN THE CLI ALONG WITH THE  
01:34:43 21 PARAMETERS NECESSARY TO STRUCTURE IT SO IT WILL INTEROPERATE  
01:34:46 22 ACROSS MULTIPLE SWITCHES.

01:34:48 23 HE'S SAYING IF THE GOAL OF THE COMMAND IS TO DESCRIBE A  
01:34:51 24 FEATURE LIKE VLAN, YOU ARE GOING TO USE THE NAME THAT THE  
01:34:56 25 INDUSTRY HAS CHOSEN TO DESCRIBE IT, TIME, AFTER TIME, AFTER

01:35:01 1 TIME.

01:35:02 2 NOW, GUESS WHAT, THE EVIDENCE SHOWS -- LET'S GO TO THE  
01:35:07 3 NEXT SLIDE. THE EVIDENCE SHOWS THAT EVEN AT CISCO THEY  
01:35:10 4 UNDERSTOOD THIS AND THEY TOLD THEIR ENGINEERS DON'T BE  
01:35:14 5 CREATIVE, BE COMMON, BE FAMILIAR.

01:35:18 6 THIS IS FROM THAT FAMOUS PARSER-POLICE MANIFESTO. WHEN  
01:35:23 7 NAMING A COMMAND, TRY TO PICK NAMES THAT WOULD BE FAMILIAR TO  
01:35:26 8 PEOPLE IN THE INDUSTRY. COMMANDS SHOULD BE SELF-EXPLANATORY SO  
01:35:31 9 THAT A KNOWLEDGEABLE USER, THAT'S THESE NETWORK OPERATORS, CAN  
01:35:36 10 FIGURE IT OUT WITHOUT SCURRYING OFF TO A MANUAL.

01:35:40 11 USE "AN ACCEPTED INDUSTRY ACRONYM." THAT'S JUST WHAT I  
01:35:45 12 WAS TALKING ABOUT, ALL THOSE PROTOCOL NAMES ARE ACCEPTED  
01:35:48 13 INDUSTRY ACRONYMS, THEY ARE TOLD TO USE THEM. DO NOT USE CODE  
01:35:50 14 NAMES.

01:35:52 15 NOW, THAT WAS THE GUIDANCE, BUT IN FACT, MR. REMAKER  
01:35:58 16 CONFIRMED THAT THAT'S WHAT THEY DID. HIS TESTIMONY WAS, THIS  
01:36:02 17 IS WHAT WE DO WHEN WE WRITE THESE COMMANDS. WE DON'T FREELANCE  
01:36:05 18 OR OFFROAD. KEEP IT SHORT. WHY? YOU ARE TYPING IT. AVOID  
01:36:11 19 COLLISIONS. WHAT HE SAID WAS "YOU DON'T USE THE SAME WORD  
01:36:14 20 TWICE AND MESS UP THE DEVICE."

01:36:16 21 CONSIDER THE AUDIENCE. WHAT DO NETWORK ENGINEERS  
01:36:19 22 UNDERSTAND? DO THEY WANT YOU TO WRITE OUT OSPF OR USE SOME  
01:36:24 23 OTHER WORD OR SOME OTHER NAME? NO. AND ARRANGED AND GROUPED  
01:36:29 24 IN A LOGICAL EASY TO FIND ORDER.

01:36:32 25 IN OTHER WORDS, THESE ARE SOME OF THE LIMITATIONS.



01:36:34 1 AND MR. KATHAIL BACKED THAT UP. HE SAID THE COMMANDS  
01:36:39 2 SHOULD COME FROM A VOCABULARY WHICH NETWORKERS USE DAY IN AND  
01:36:44 3 DAY OUT. THAT'S TRUE. IF YOU ARE TALKING ABOUT HOCKEY, YOU  
01:36:46 4 USE THE LANGUAGE OF HOCKEY. IF YOU ARE TALKING ABOUT  
01:36:48 5 NETWORKING, YOU USE THE LANGUAGE OF NETWORKING THAT NETWORK  
01:36:51 6 ENGINEERS ARE ALL FAMILIAR WITH.

01:36:54 7 AND THAT'S -- THAT IS TRUE FOR ALL OF THESE COMMANDS,  
01:36:57 8 WHICH IS WHY NONE OF THIS IS PROTECTABLE. EITHER A SINGLE  
01:37:03 9 MULTIWORD COMMAND, JUDGE FREEMAN HAS ALREADY TOLD YOU THAT, OR  
01:37:07 10 THE COMPILATION ITSELF. THE COMPILATION IS NO DIFFERENT. IT'S  
01:37:11 11 JUST A COLLECTION OF THESE COMMANDS, ALSO FROM INDUSTRY  
01:37:15 12 STANDARD PROTOCOLS.

01:37:17 13 COULD I GO BACK TO THE COLOR-CODED CHART, MR. DAHM.

01:37:21 14 THE LAST POINT I'M GOING TO MAKE ON THIS PART OF IT IS  
01:37:24 15 THAT AT LEAST SOMEONE MADE AN EFFORT TO ANALYZE THIS. AND THAT  
01:37:28 16 WAS PROFESSOR BLACK. AND HE WENT THROUGH THEM ALL, HE  
01:37:31 17 PRESENTED SOME OF THESE, BUT EVERYTHING IN GREEN IS DIRECTLY  
01:37:35 18 FROM AN INDUSTRY STANDARD. DIRECTLY. EVERYTHING IN GRAY THAT  
01:37:40 19 MR. NELSON WAS CALLING THAT THE BROWN STUFF, THAT'S ALL COMMON  
01:37:44 20 TERMINOLOGY THAT PRE-EXISTED. "CLEAR," "CLOCK," "SHOW."

01:37:50 21 THE BLUE DON'T NECESSARILY COME DIRECTLY FROM A PROTOCOL,  
01:37:55 22 BUT THEY ARE COMMON INDUSTRY TERMS THAT ANY NETWORKING ENGINEER  
01:37:58 23 WOULD UNDERSTAND. "CONTROL PLANE," "TIME ZONE," "DYNAMIC,"  
01:38:02 24 "ROUTE," "MROUTE," ET CETERA, ET CETERA, ET CETERA.

01:38:07 25 SO THE POINT HERE, LADIES AND GENTLEMEN, IS COPYING IS NOT

01:38:12 1 COPYRIGHT INFRINGEMENT UNLESS YOU ARE COPYING SOMETHING THAT'S  
01:38:15 2 PROTECTED AND ORIGINAL, AND THAT NEVER HAPPENED HERE.

01:38:18 3 LET ME TALK ABOUT ONE OTHER TOPIC IN THIS SAME AREA, THAT  
01:38:23 4 IS THE HELP STRINGS. THE HELP STRINGS. LET'S GO FORWARD TO  
01:38:27 5 THE HELP STRINGS SLIDE WITH DR. ALMEROOTH.

01:38:32 6 REMEMBER THE HELP STRINGS ARE ALSO NOT INDIVIDUALLY  
01:38:35 7 PROTECTABLE. BUT THEY ARE CLAIMING A COMPILATION. AND HERE'S  
01:38:39 8 WHERE I WANT TO PAUSE AND SAY THAT DR. ALMEROOTH'S TESTIMONY  
01:38:42 9 OVERALL IS OF NO VALUE. HE IS TRULY JUST AN ADVOCATE FOR  
01:38:50 10 CISCO. HE CAME IN HERE PRETENDING TO BE INDEPENDENT.

01:38:53 11 IN FACT, HE'S HAD A FINANCIAL RELATIONSHIP WITH CISCO FOR  
01:38:56 12 20 YEARS. AND AS YOU SAW DURING HIS EXAMINATIONS, THERE WERE  
01:39:01 13 TWO OF THEM, HE WOULDN'T AGREE TO THE SIMPLEST THING.

01:39:04 14 HERE HE IS SAYING THAT "DELETE A FILE," THAT PHRASE, IS  
01:39:07 15 ELEGANT.

01:39:08 16 AMONG WHAT YOU ARE ASSERTING ARE DELETE A FILE, RIGHT?  
01:39:11 17 ELEGANT.

01:39:12 18 RENAME A FILE, CREATIVE, RIGHT? ACCORDING TO DR. ALMEROOTH  
01:39:17 19 THAT'S CREATIVE.

01:39:19 20 CHANGE CURRENT DIRECTLY? ORIGINAL? YES.

01:39:25 21 TIME IN MINUTES. TIME IN MINUTES. THERE'S ANOTHER ONE ON  
01:39:29 22 THIS STRING OF CREATIVE? YES.

01:39:33 23 COME ON. COME ON. THAT KIND OF TESTIMONY MEANS YOU ARE  
01:39:36 24 ONLY HERE TO BE AN ADVOCATE, NOT AN INDEPENDENT EXPERT.

01:39:41 25 AND MY POINT THERE IS THAT THE HELP DESCRIPTIONS OF WHICH

01:39:45 1 BY THE WAY THERE ARE 52,000 IN IOS, AND SOMETHING LIKE 200 ARE  
01:39:52 2 ACCUSED HERE, THESE ARE TRIVIAL, THESE ARE TRULY TRIVIAL,  
01:39:57 3 INSIGNIFICANT, NOT PROTECTABLE, VERY COMMON.

01:40:00 4 OKAY. FINAL POINT, WE WILL MOVE ON, IS NOT EVEN THE  
01:40:04 5 MANUALS ARE TRULY ORIGINAL TO CISCO. THIS IS THE TESTIMONY OF  
01:40:08 6 MR. LOUGHEED, WHEN MR. SILBERT EXAMINED HIM, THAT WAS WAY BACK  
01:40:13 7 A COUPLE OF WEEKS AGO. WE ASKED HIM, YOU COPIED SUBSTANTIAL  
01:40:16 8 PORTIONS OF THE MANUAL, COPYRIGHTED TO STANFORD, TO CREATE THE  
01:40:20 9 CISCO MANUAL, RIGHT? THAT'S RIGHT.

01:40:24 10 NOW, DO I SAY THAT'S REALLY WRONG AND A TERRIBLE THING?  
01:40:28 11 NO, BECAUSE AGAIN, THE MANUAL ISN'T PROTECTABLE, MR. LOUGHEED  
01:40:32 12 DIDN'T TREAT IT AS PROTECTABLE, HE COPIED IT, HE FELT HE WAS  
01:40:37 13 FREE TO COPY IT. UNPROTECTABLE MATERIAL.

01:40:40 14 SO LET'S LOOK AT THE VERDICT FORM. AND I WANT TO EXPLAIN  
01:40:43 15 HOW THESE THINGS ARE RELATED.

01:40:47 16 SCÈNES À FAIRE AND MERGER ARE CLOSELY RELATED TO COPYRIGHT  
01:40:50 17 INFRINGEMENT. WE'VE SHOWN AND THE EVIDENCE SUPPORTS THAT  
01:40:52 18 NOTHING PROTECTED WAS COPIED.

01:40:54 19 IF YOU AGREE THE EVIDENCE SUPPORTS THAT, THE ANSWER ON  
01:40:57 20 QUESTION 1 IS NO. IF YOU ANSWER QUESTION 1 NO, YOU DON'T GO ON  
01:41:01 21 TO ANSWER QUESTION 2 AT ALL. YOU SKIP ON FURTHER IN THE  
01:41:05 22 VERDICT FORM, RIGHT?

01:41:06 23 AND SO OUR POINT ON QUESTION 1 IS NOTHING PROTECTABLE WAS  
01:41:10 24 COPIED, PERIOD.

01:41:12 25 OUR POINT ON 2 IS, AND WE WILL TALK ABOUT FAIR USE IN A

01:41:15 1 MINUTE BECAUSE THAT'S SEPARATE, SCÈNES À FAIRE AND MERGER ARE  
01:41:20 2 ANOTHER CONCEPTS AROUND THIS PROTECTABILITY, RIGHT? IF THERE'S  
01:41:25 3 ONLY ONE OR A FEW WAYS TO SAY, AND IF THERE'S LOTS OF EXTERNAL  
01:41:30 4 CONSTRAINTS, IT'S ALSO NOT INFRINGEMENT TO USE IT.

01:41:35 5 THE LAW ALLOWS USE OF THINGS BECAUSE AGAIN, IF THERE'S  
01:41:37 6 ONLY A FEW WAYS TO DO IT, YOU DON'T WANT TO GIVE ONE AUTHOR,  
01:41:42 7 PARTICULARLY HERE IN A FUNCTIONAL AREA, THE EXCLUSIVE RIGHT TO  
01:41:45 8 USE IT.

01:41:45 9 OKAY. LET'S TALK ABOUT FAIR USE. FAIR USE IS A  
01:41:49 10 COMPLETELY SEPARATE CONCEPT. FAIR USE IS PART OF THE COPYRIGHT  
01:41:55 11 STATUTE, AND IF A USE IS A FAIR USE, COPYING IS ALLOWED AND  
01:42:01 12 THERE IS NO INFRINGEMENT.

01:42:04 13 LET'S TAKE A LOOK AT THE NEXT SLIDE.

01:42:06 14 OKAY. HERE'S THE INSTRUCTION THAT YOU HEARD THIS MORNING.  
01:42:09 15 IT'S NUMBER 46. VERY IMPORTANT. SOMEONE WHO IS NOT THE OWNER  
01:42:13 16 OF THE COPYRIGHT, HERE THAT'S ARISTA, MAY USE A COPYRIGHTED  
01:42:18 17 WORK IN A REASONABLE WAY UNDER THE CIRCUMSTANCES WITHOUT THE  
01:42:23 18 CONSENT OF THE OWNER. THAT'S CISCO. IF IT WOULD ADVANCE THE  
01:42:27 19 PUBLIC INTEREST. IF IT WOULD ADVANCE THE PUBLIC INTEREST.

01:42:30 20 THE PUBLIC INTEREST HERE IS IN INNOVATION, FAIR USE IS  
01:42:34 21 INTENDED TO FOSTER INNOVATION. SUCH A USE IS CALLED A FAIR  
01:42:40 22 USE.

01:42:41 23 THEN THEY SAY IT AGAIN, THE OWNER OF A COPYRIGHT, THAT'S  
01:42:43 24 CISCO, CANNOT PREVENT OTHERS FROM MAKING A FAIR USE OF THE  
01:42:48 25 OWNER'S COPYRIGHTED WORK.

01:42:50 1 AGAIN, IF THE USE IS A FAIR USE AND IN THE PUBLIC  
01:42:53 2 INTEREST, THEN THE OWNER DOESN'T HAVE THE RIGHT TO PREVENT IT.

01:42:57 3 NOW HOW ARE YOU GOING TO EVALUATE THAT? THE COURT HAS  
01:42:59 4 GIVEN YOU FOUR FACTORS, AND I PUT THEM ON A BOARD SO WE COULD  
01:43:04 5 WALK THROUGH THEM ALONG WITH THE SLIDES.

01:43:06 6 AND THIS WAS IN THE NEXT CONSTRUCTION. THERE THEY ARE.  
01:43:15 7 OKAY. FAIR USE.

01:43:18 8 ON THE LEFT IS THE FACTOR. ON THE RIGHT IS A LITTLE  
01:43:21 9 SUMMARY OF WHAT I'M GOING TO SAY ABOUT EACH ONE.

01:43:27 10 SO THE IDEA OF FAIR USE IS IT'S A SET OF FACTORS THAT YOU  
01:43:31 11 EVALUATE AND BALANCE TOGETHER. AND THE FIRST FACTOR IS THE  
01:43:34 12 PURPOSE AND CHARACTER OF THE USE. AND THAT ADDRESSES WHETHER A  
01:43:38 13 USE IS TRANSFORMATIVE OR WHETHER IT'S JUST A COPY, RIGHT?

01:43:44 14 OBVIOUSLY, IF YOU KNOCK OFF A CD OR YOU COPY A MOVIE OR  
01:43:48 15 SOMETHING LIKE THAT, THAT'S NOT FAIR USE, YOU ARE JUST COPYING  
01:43:51 16 AND TAKING ADVANTAGE.

01:43:53 17 BUT, IF YOU TAKE A LIMITED AMOUNT OF MATERIAL AND TURN IT  
01:44:00 18 INTO SOMETHING TRANSFORMATIVE, THAT FAVORS FAIR USE BECAUSE  
01:44:04 19 AGAIN, IT FAVORS INNOVATION AND THAT'S WHAT FAIR USE IS SEEKING  
01:44:10 20 TO DO. WE ARE GOING TO GO THROUGH THAT FACTOR IN A MINUTE.

01:44:13 21 THE NATURE OF THE COPYRIGHTED WORK, THAT ADDRESSES, IS  
01:44:15 22 THIS SOMETHING NEAR THE HEART OF CREATIVE WORK LIKE ART OR  
01:44:20 23 POETRY OR MOVIES OR BOOKS, OR IS IT MORE FACTUAL OR FUNCTIONAL,  
01:44:26 24 LIKE COMPUTER PROGRAMS.

01:44:27 25 IF IT'S MORE LIKE ART, IT'S MORE HEAVILY PROTECTED. IF

01:44:31 1 IT'S MORE LIKE FUNCTIONAL, THAT FAVORS FAIR USE.

01:44:37 2 HOW MUCH WAS TAKEN? THE AMOUNT AND SUBSTANTIALITY OF THE  
01:44:41 3 PORTION USED. IF YOU KNOCK OFF THE WHOLE -- YOU BOOTLEG A CD,  
01:44:46 4 YOU KNOCK OFF THE WHOLE THING. AGAIN, THAT'S NOT FAIR USE.  
01:44:49 5 BUT IF A SMALL FRACTION OF THE COMPILATION OR THE COPYRIGHTED  
01:44:53 6 WORK IS INVOLVED, THAT FAVORS FAIR USE.

01:44:56 7 AND THE LAST FACTOR GOES TO WHETHER OR NOT THE USE IN THIS  
01:45:00 8 CASE OF THE CLI CAUSED ANY MARKET HARM.

01:45:03 9 NOW THESE FACTORS AREN'T EXCLUSIVE. AND ONE OF THE KEY  
01:45:08 10 FACTORS IS WHAT WOULD A REASONABLE COPYRIGHT OWNER WOULD HAVE  
01:45:12 11 THOUGHT WAS FAIR. WE KNOW WHAT THE COPYRIGHT OWNER HERE  
01:45:14 12 THOUGHT WAS FAIR BECAUSE CISCO MADE A CONSCIENCE BUSINESS  
01:45:17 13 CHOICE TO PROMOTE THE CLI AS INDUSTRY STANDARD. THAT FITS IN  
01:45:22 14 TO ANOTHER FACTOR.

01:45:23 15 OKAY. LET'S WALK THROUGH THESE. AND THE FIRST ONE I  
01:45:27 16 TALKED ABOUT BEFORE LUNCH. TRANSFORMATIVE USE, RIGHT?

01:45:33 17 THEY TOOK -- THEY USED A SMALL NUMBER OF COMMANDS TO  
01:45:35 18 CREATE SOMETHING VERY DIFFERENT. AND NOT ONLY IS THE SWITCH  
01:45:39 19 DIFFERENT, NAMELY, THE HIGH SPEED NETWORKING IN THE CLOUD, BUT  
01:45:43 20 THE CLI WERE TRANSFORMED TOO. FULLY AUTOMATED SO THAT YOU  
01:45:47 21 DIDN'T HAVE TO CONFIGURE ONE SWITCH AT A TIME.

01:45:50 22 THIS IS THE DEFINITION OF TRANSFORMATIVE USE. IT'S  
01:45:54 23 TRANSFORMATIVE IF IT ADDS SOMETHING NEW WITH A FURTHER PURPOSE  
01:45:57 24 OR DIFFERENT CHARACTER.

01:45:59 25 NOW I KNOW THAT CISCO IS GOING TO SAY, WELL, WAIT A

01:46:01 1 MINUTE, IT'S JUST A SWITCH, SO IT'S NOT ANYTHING NEW.

01:46:04 2 WELL, NO, IT'S NOT JUST A SWITCH, THIS SWITCH HAS CHANGED  
01:46:08 3 THE INDUSTRY WHICH IS GOING THROUGH A HUGE MARKET TRANSITION.  
01:46:13 4 JUST LIKE WHEN SMART PHONES CAME ALONG, YEAH, IT'S A PHONE, BUT  
01:46:18 5 VERY DIFFERENT FROM A CELL PHONE. MUCH MORE FUNCTIONALITY.  
01:46:22 6 MANY MORE FEATURES. TESLA CAME ALONG, RIGHT? THAT'S JUST A  
01:46:26 7 CAR, WE SAY, JUST A CAR, BUT IT MIGHT CHANGE EVERYTHING.

01:46:30 8 GO BACK IN TIME WHEN MAC CAME ALONG, WHEN COMPUTERS CAME  
01:46:35 9 ALONG, TYPEWRITERS, WHAT HAPPENED TO THEM? IT'S JUST A MACHINE  
01:46:39 10 FOR ENTERING DATA. WELL, NO, IN FACT, IT'S TRANSFORMATIVE.

01:46:41 11 AND THAT'S THE WHOLE POINT OF THIS JURY INSTRUCTION IS TO  
01:46:45 12 FOCUS YOU ON THAT.

01:46:48 13 AND AS DR. BLACK SAID, THIS IS TRANSFORMATIVE BECAUSE  
01:46:51 14 IT'S -- NO ONE ELSE WAS ABLE TO SELECT A SMALL NUMBER OF  
01:46:55 15 COMMANDS, ADD THOUSANDS OF OTHER COMMANDS, ADD NEW FEATURES AND  
01:46:59 16 FUNCTIONS, FULLY AUTOMATE THE CLI, PUT IT ON TOP OF A LINUX  
01:47:06 17 KERNEL TO MAKE IT PROGRAMMABLE LIKE YOUR SMART PHONE IS, IF YOU  
01:47:10 18 WANT TO DOWNLOAD APPS ON IT, THAT'S WHAT ALL THE WITNESSES HAVE  
01:47:14 19 TESTIFIED TO.

01:47:15 20 NOW, I DON'T WANT TO REPEAT EVERYTHING I SAID THIS  
01:47:17 21 MORNING, BUT LET ME JUST SHOW A LITTLE BIT OF ADDITIONAL  
01:47:20 22 EVIDENCE OF THIS POINT.

01:47:21 23 ONE, WE HAVE MR. REMAKER, AGAIN, "ARISTA HAS AN XMPP BASED  
01:47:26 24 CLI," THAT MEANS A NEW TYPE OF CLI THAT'S AUTOMATED. "VERY  
01:47:30 25 COOL. WISH WE DID THIS. WISH WE HAD DONE THIS. MAYBE WE

01:47:35 1  
01:47:36 2  
01:47:38 3  
01:47:43 4  
01:47:47 5  
01:47:49 6  
01:47:54 7  
01:47:57 8  
01:48:02 9  
01:48:05 10  
01:48:10 11  
01:48:13 12  
01:48:17 13  
01:48:20 14  
01:48:25 15  
01:48:30 16  
01:48:33 17  
01:48:34 18  
01:48:36 19  
01:48:40 20  
01:48:44 21  
01:48:49 22  
01:48:53 23  
01:48:57 24  
01:49:01 25

STILL CAN."

THAT'S MR. REMAKER.

MR. PATIL, THIS WAS TESTIMONY, THIS ISN'T A TRIAL EXHIBIT THAT, LAST ONE BY THE WAY WAS TRIAL EXHIBIT 5161, THAT WAS MR. REMAKER'S COMMENT, 5161.

THIS IS TESTIMONY. ON THE STAND, ON THE VIDEO. "WHAT DID YOU LEARN ABOUT ARISTA'S EOS PRODUCT FROM YOUR RESEARCH?"

"THEY HAVE CREATED A NON MONOLITHIC SWITCHING OPERATING SYSTEM WHICH IS VERY RESILIENT AND HIGHLY AVAILABLE, THAT MEANS RELIABLE, AND ON MOST OF THE TIME. AND PERFORMS AT AN IMPRESSIVE METRICS LEVEL."

HIGH SPEED, HIGH RELIABILITY, LOW POWER USE, THAT'S PATIL.

LOOK AT THIS NEXT ONE. REMEMBER WHEN MR. CHAMBERS WAS HERE, WE LOOKED AT THIS. THIS WAS THE COST SHEET WITH HIS PICTURE ON IT AND THE PICTURE OF THE GUY AT MICROSOFT THAT HE WAS GOING TO VISIT. THIS IS A VISIT THEY WERE GOING TO MAKE TO MICROSOFT.

THIS IS WHAT CISCO SAID, CISCO SAID IN 2012.

AND THIS IS TX 5495. "ARISTA IS OUTPERFORMING CISCO ON PRICE, PRODUCT, ROAD MAP, VISION." PRICE, PRODUCT, ROAD MAP, VISION. WHAT ELSE IS THERE? WHAT ELSE IS THERE? EVEN MR. CHAMBERS COULDN'T COME UP WITH ANYTHING BEYOND IS THAT. AND AGAIN, THAT'S HIGH PRAISE FROM YOUR COMPETITION.

NOW THERE IS ONE ASPECT OF THIS FIRST FACTOR THAT COUNTS AGAINST FAIR USE, AND LET'S PUT THAT OUT THERE TOO.



01:49:03 1 COMMERCIAL. IS THIS A COMMERCIAL PRODUCT? SURE, IT IS,  
01:49:06 2 ABSOLUTELY. ABSOLUTELY, ARISTA IS SELLING IT FOR MONEY.

01:49:09 3 HOWEVER, THIS IS JURY INSTRUCTIONS 49. VERY IMPORTANT.

01:49:14 4 COMMERCIAL USE WEIGHS AGAINST FAIR USE. THAT'S TRUE.

01:49:18 5 HOWEVER, THE MORE TRANSFORMATIVE THE NEW WORK, THE LESS WILL BE  
01:49:21 6 THE SIGNIFICANCE OF OTHER FACTORS LIKE COMMERCIALISM.

01:49:25 7 THE CONCEPT HERE IS, IF YOU ARE MAKING A BIG CHANGE, AND  
01:49:28 8 IF YOU ARE CHANGING, MAKING A TRANSITION, THEN THE COMMERCIAL  
01:49:34 9 NATURE OF IT IS LESS IMPORTANT.

01:49:35 10 WHEN COMPUTERS CAME ALONG AND REPLACED TYPEWRITERS, THAT  
01:49:38 11 WAS A HUGE TRANSITION. AND CERTAINLY THERE WAS AN IMPACT ON  
01:49:42 12 TYPEWRITER SALES. BUT UNDER THE FAIR USE LAW, WE ARE TRYING TO  
01:49:45 13 ENCOURAGE THAT TYPE OF THING. AND SO THE COMMERCIALISM IS LESS  
01:49:48 14 IMPORTANT. BUT DON'T GET ME WRONG, IT'S A COMMERCIAL PRODUCT  
01:49:51 15 FOR SURE.

01:49:55 16 FACTOR TWO, IS IT INFORMAL OR CREATIVE?

01:49:59 17 OKAY. WE KNOW WHAT IT IS HERE. THESE ARE COMMANDS  
01:50:02 18 ENTERED INTO A SYSTEM TO COMMUNICATE WITH A SWITCH. THAT IS  
01:50:05 19 NOT SHAKESPEARE, THAT IS NOT POETRY, THAT IS NOT SOMETHING AT  
01:50:10 20 THE HEART OF THE CREATIVE PROCESS, IT'S A NERD KNOB, RIGHT?  
01:50:14 21 THAT'S WHAT OUR NEXT SLIDE SHOWS.

01:50:16 22 THE NEXT SLIDE IS WHAT WE HEARD FROM DR. BLACK, IT'S A  
01:50:20 23 NERD KNOB. IT'S THE LABELS. IT'S THE LABELS ON THE DIALS,  
01:50:25 24 IT'S NOT HOW THE DEVICE WORKS. IT'S A FUNCTIONAL THING.

01:50:31 25 FACTOR THREE, THE AMOUNT AND SUBSTANTIALITY OF THE PORTION

01:50:34 1 USED.

01:50:34 2 OKAY. LET'S TAKE A LOOK AT THAT. HERE'S THE DISPUTED  
01:50:38 3 COMMANDS. WHY ARE THERE ONLY 441 AND NOT 506? BECAUSE THIS IS  
01:50:43 4 JUST IOS. IOS -- THEY HAVE FOUR OPERATING SYSTEMS HERE, THEY  
01:50:48 5 HAVE ADDED THEM UP TO GET TO THE 500. THERE'S 441 COMMANDS IN  
01:50:53 6 IOS. THAT'S LESS THAN THREE PERCENT OF ALL THE COMMANDS IN  
01:50:57 7 IOS. THERE'S 16,000 COMMANDS IN IOS. AND YOU WILL SEE THAT  
01:51:04 8 NUMBER IN THE EVIDENCE THERE AT TRIAL EXHIBIT 7543. THAT'S  
01:51:09 9 WHERE THE 16,000 NUMBER IS AT PAGE 14. OKAY. THAT'S THE  
01:51:13 10 COMMANDS.

01:51:15 11 AND AGAIN, AS I SAID, THERE'S NO EVIDENCE THAT THIS SET OF  
01:51:18 12 COMMANDS THAT ARE BEING USED AT ARISTA ARE ANYTHING SPECIAL OR  
01:51:22 13 UNIQUE OR DIFFERENT.

01:51:24 14 OKAY. LET'S LOOK AT THE OTHER TWO CATEGORIES, HELP  
01:51:28 15 DESCRIPTIONS, DR. BLACK TESTIFIED THERE'S 52,000 OF THOSE, THEY  
01:51:32 16 ARE COMPLAINING ABOUT 216. THAT'S LESS THAN 1 PERCENT.

01:51:35 17 AND AS I SAID, THESE ARE ROUTINE, COMMON, ORDINARY  
01:51:38 18 DESCRIPTIONS, NOT EVEN ENTITLED TO PROTECTION IN THE FIRST  
01:51:42 19 PLACE.

01:51:43 20 COMMAND OUTPUTS. AGAIN, DR. ALMEROOTH CONFIRMED THERE'S  
01:51:48 21 THOUSANDS OF THOSE. 37 AT ISSUE. THEY WENT THROUGH ALL THE  
01:51:51 22 COMMAND OUTPUTS, ALL OF THE THOUSANDS THAT THE EOS GENERATES  
01:51:56 23 AND THEY FOUND 37 TO COMPLAIN ABOUT, THAT'S IT.

01:51:59 24 EVEN THE MODES ARE A SMALL PERCENTAGE. THERE ARE MORE  
01:52:04 25 THAN 100 MODES IN IOS.

01:52:07 1 NEXT SLIDE, PLEASE.

01:52:10 2 THAT'S WHAT DR. ALMEROOTH SAID THEY ARE COMPLAINING ABOUT  
01:52:13 3 FOUR.

01:52:13 4 AND SIMILARLY WITH THE TECHNICAL MANUALS, REMEMBER IN THE  
01:52:17 5 OPENING AND THIS IS STILL TRUE, THERE'S ONE SNIPPET THEY FOUND  
01:52:21 6 OUT OF A 5 OR 600 PAGE MANUAL. THIS IS THE MANUAL THAT THAT  
01:52:24 7 SNIPPET IS FOUND IN. THEY WENT THROUGH THE WHOLE THING.  
01:52:27 8 THERE'S THE GREEN TAB, THEY FOUND TWO OR THREE LINES.

01:52:32 9 AGAIN, TRULY TRIVIAL. INSIGNIFICANT.

01:52:36 10 NOW, ARISTA DOESN'T TOLERATE PLAGIARISM, SO AS YOU NOW  
01:52:40 11 WELL KNOW THE EMPLOYEE THAT WAS INVOLVED IN THAT IS NO LONGER  
01:52:43 12 EMPLOYED.

01:52:44 13 ALL RIGHT. THE LAST FACTOR IS MARKET HARM.

01:52:46 14 AND AGAIN, THERE'S A GOOD JURY INSTRUCTION THAT EXPLAINS  
01:52:49 15 THIS, NUMBER 56. IF THE COPYRIGHTED MATERIAL IS  
01:52:55 16 TRANSFORMATIVE, MARKET SUBSTITUTION IS LESS CERTAIN AND MARKET  
01:52:58 17 HARM CANNOT BE PRESUMED.

01:53:00 18 WELL, AGAIN, TRANSFORMATIVE USE IS THE KEY. THE ISSUE  
01:53:03 19 HERE IS, IS THE USE OF THE CLI CAUSING CISCO ANY HARM? NO.  
01:53:09 20 AND OF COURSE NOT. THE REASON THESE SWITCHES ARE SELLING IS  
01:53:14 21 THEY ARE BETTER, THEY ARE FASTER, THEY ARE EASIER TO USE, THEY  
01:53:19 22 ARE PROGRAMMABLE AND CISCO MISS THE MARKET.

01:53:25 23 THIS IS WHAT THEIR EXPERT TOLD US, THE CLI CAN'T BE THE  
01:53:28 24 REASON WHY ARISTA WON. SHE'S CONFIRMING WHAT I JUST SAID, THAT  
01:53:32 25 THE CLI ARE NOT THE REASON THAT PEOPLE ARE BUYING THESE

01:53:36 1 SWITCHES. SHE SAID IT TWICE.

01:53:39 2 AND MR. CHAMBERS SAID, WE MISSED THE TRANSITION IN THIS  
01:53:46 3 MARKET. WE MISSED THE TRANSITION IN THIS MARKET. AND AS A  
01:53:49 4 RESULT OF THAT, THEY WEREN'T ABLE TO PROVIDE THE SERVICES AND  
01:53:52 5 PRODUCTS THEIR CLIENTS WANTED.

01:53:54 6 THAT HAS NOTHING TO DO WITH THE CLI. LET'S LOOK AT THE  
01:53:56 7 NEXT ONE.

01:53:57 8 HERE IS AN INTERNAL E-MAIL AT CISCO, FACEBOOK'S POSITION  
01:54:02 9 IS THAT CISCO IS BEHIND THE CURVE AND ON TARGET TO BECOME  
01:54:06 10 IRRELEVANT. ON TARGET TO BECOME IRRELEVANT, NOT A GOOD PLACE  
01:54:09 11 TO BE.

01:54:10 12 AGAIN, THEY MISSED THE MARKET. THIS HAS NOTHING TO DO  
01:54:13 13 WITH THE CLI. YOU WERE HERE WHEN CHRIS SUMMERS TESTIFIED LAST  
01:54:17 14 WEEK, THE YOUNG GUY WHO WAS THE FIELD SALES REP, FIELD SALES  
01:54:21 15 ENGINEER FOR ARISTA. WHAT HE SAID WAS, PEOPLE LIKE FACEBOOK DO  
01:54:24 16 THEIR OWN CLI. THEY WRITE THEIR OWN SCRIPTS. THEY WANT A CLI,  
01:54:29 17 SURE, BUT THEY DON'T CARE HOW COMMON OR FAMILIAR IT IS. IT  
01:54:33 18 DOESN'T HAVE TO BE CISCO-LIKE.

01:54:35 19 NOW SOME OF THEM HAVE SCRIPTS THAT EXIST, THEY DON'T WANT  
01:54:39 20 TO REWRITE THEM, BUT WHAT ALL THE TESTIMONY WAS FROM  
01:54:43 21 MR. SUMMERS AND MR. SADANA, AND EVEN FROM CISCO, THE MARKET IS  
01:54:47 22 MOVING AWAY FROM THE CLI AND CISCO JUST DIDN'T GET THERE FAST  
01:54:52 23 ENOUGH.

01:54:53 24 HERE'S THE MICROSOFT PART OF THE STORY -- THAT LAST ONE  
01:54:56 25 WAS FACEBOOK, TX 5219.

01:54:59 1 "WE HAVE FAILED TO DELIVER CRITICAL FEATURES FOR THE LAST  
01:55:02 2 FIVE MONTHS."

01:55:03 3 THAT'S GOT NOTHING TO DO WITH THE CLI. THEY FAILED TO  
01:55:06 4 DELIVER FEATURES THAT THE CLIENT WANTED.

01:55:11 5 ALL RIGHT. LET'S GO PASS THIS ONE.

01:55:14 6 OKAY. AGAIN, I THINK THESE FACTORS ALL WEIGH IN FAVOR OF  
01:55:19 7 FAIR USE, BUT THAT'S FOR YOU TO RESOLVE AND IT'S FOR YOU TO  
01:55:23 8 BALANCE THESE AND EVALUATE THEM.

01:55:28 9 AND WHEN IT COMES TO NONEXCLUSIVE, THE COURT HAS TOLD YOU,  
01:55:32 10 INSTRUCTION 56, THAT ONE OF THE POLICIES IS TO PERMIT LIMITED  
01:55:37 11 COPYING IN SPECIFIC CIRCUMSTANCES THAT AUTHORS REASONABLY  
01:55:42 12 EXPECT AND THAT ALLOW PRODUCTIVE USE OF THE WORK.

01:55:45 13 OKAY. LET'S GO OVER THAT AGAIN. PRODUCTIVE USE OF THE  
01:55:47 14 WORK MEANS INNOVATION. AND WHAT DO AUTHORS REASONABLY EXPECT?  
01:55:54 15 HEY, WE KNOW WHAT THIS AUTHOR EXPECTED, WE KNOW THIS AUTHOR  
01:55:58 16 EXPECTED, HAVING HEARD FROM MR. VOLPI AND HEARD FROM  
01:56:01 17 MR. GIANCARLO, AND HEARD FROM MR. KATHAIL, THEY EXPECTED PEOPLE  
01:56:05 18 TO USE THE CLI, THEY PROMOTED IT AS AN INDUSTRY STANDARD,  
01:56:11 19 BECAUSE IT WAS BETTER FOR THEIR CUSTOMERS AND BETTER FOR CISCO.

01:56:16 20 AND THAT'S BEEN PROVEN BEYOND ANY QUESTION. BEYOND ANY  
01:56:19 21 QUESTION. BETWEEN THE DOCUMENTS AND THE TESTIMONY, THAT'S WHAT  
01:56:23 22 THIS REASONABLE COPYRIGHT OWNER THOUGHT.

01:56:25 23 AND IF THERE WERE ANY DOUBT ABOUT IT, LET'S GO BACK ONE,  
01:56:25 24 (REDACTED) .

01:56:53 25 SO LADIES AND GENTLEMEN, I'VE CHECKED THE VERDICT FORM.

THIS IS AGAIN, THIS IS SEPARATE AND APART FROM YOUR  
INFRINGEMENT ANALYSIS, IF YOU FIND NO INFRINGEMENT, YOU DON'T  
REACH FAIR USE. BUT THIS IS SOMETHING YOU LOOK AT EVEN IF YOU  
FIND THERE'S COPYRIGHT INFRINGEMENT BECAUSE FAIR USE TRUMPS IT  
IN THE STATUTE.

OKAY. LET'S SPEND A MINUTE ON PATENT INFRINGEMENT. THEY  
DIDN'T COME CLOSE TO PROVING PATENT INFRINGEMENT. NOT EVEN  
CLOSE.

NEXT SLIDE.

YOU REMEMBER I SHOWED YOU IN THE OPENING, THIS LITTLE  
HANDY DANDY GUIDE. WHAT IT MEANS IS, EVERY REQUIREMENT MUST BE  
MET. EVERY REQUIREMENT MUST BE MET. THAT'S IN JURY  
INSTRUCTION 74.

JUDGE FREEMAN HAS GIVEN US THE TEXT VERSION OF THIS, EVERY  
REQUIREMENT. AND YOU KNOW FROM MR. KRISHNAN'S PRESENTATION,  
THAT THERE ARE TWO REQUIREMENTS THAT ARE NOT MET, AT LEAST, IN  
THIS PATENT.

ONE IS THAT THE MANAGEMENT AGENTS DO NOT EXECUTE THE  
PRESCRIBED COMMANDS. AND THE SECOND IS THERE ISN'T A COMMAND  
ACTION VALUE ON SIGNED TO EACH WORD OF A GENERIC COMMAND.

LET'S GO TO THE NEXT ONE.

THIS IS WHAT DR. JEFFAY PRESENTED. AND HE SAID ON THE  
RIGHT, THE MANAGEMENT PROGRAMS LISTED THERE, THEY EXECUTE THE  
COMMANDS, AND THAT'S INFRINGEMENT.

BUT MR. KRISHNAN ESTABLISHED, HE COULDN'T PROVE THAT WITH

01:58:17 1 THE SOURCE CODE. WE ASKED HIM POINT BLANK, YOU NEVER SHOWED  
01:58:21 2 THE SPECIFIC SOURCE CODE TRACES THAT WOULD PROVE THAT, DID YOU?  
01:58:25 3 NO.

01:58:26 4 THAT'S CRITICAL. HE DIDN'T HAVE IT. INSTEAD, MR. CHASE  
01:58:30 5 CAME IN WITH THE SOURCE CODE AND SAID, THESE COMMANDS ARE NOT  
01:58:34 6 EXECUTED BY THE MANAGEMENT AGENTS, THEY ARE EXECUTED BY THE CLI  
01:58:38 7 ON THE LEFT. EXECUTED BY THE CLI ON THE LEFT.

01:58:42 8 SECOND ISSUE, NOT REALLY EVEN ADDRESSED THIS MORNING IS  
01:58:46 9 THAT WHEN A USER TYPES IN A GENERIC COMMAND, THAT'S A COMMAND  
01:58:50 10 TYPED BY A USER, THE PATENT REQUIRES THAT THERE BE AN ACTION  
01:58:54 11 VALUE ASSIGNED TO EVERY WORD. DR. JEFFAY AGREES WITH THAT.

01:59:00 12 WELL, GUESS WHAT? THAT'S NOT HOW ARISTA'S SYSTEM WORKS,  
01:59:03 13 AND THAT'S UNDISPUTED. THE PATENT REQUIRES EACH WORD OF THE  
01:59:07 14 COMMAND, GET TCP CONNECTION, TO BE ASSOCIATED -- ASSOCIATED TO  
01:59:13 15 BE ASSIGNED A COMMAND ACTION VALUE. THAT'S WHAT'S SHOWN ON THE  
01:59:19 16 TOP AND THAT'S WHAT THE CLAIM CONSTRUCTION REQUIRES. 1-TO-1.

01:59:22 17 IF THERE'S A WORD, IT'S GOT TO BE ASSIGNED A VALUE.  
01:59:25 18 THAT'S NOT HOW ARISTA WORKS, AND THERE'S NO DISPUTE ABOUT THIS,  
01:59:30 19 THE SO CALLED CONTEXT.STATE DOES NOT MEAN A THING.

01:59:33 20 DR. CHASE TESTIFIED THAT IN NO CIRCUMSTANCE IS A COMMAND  
01:59:38 21 ACTION VALUE ON SIGNED TO EVERY WORD. IN ARISTA'S SYSTEM  
01:59:42 22 THERE'S A VALUE ASSIGNED TO THE ENTIRE COMMAND, RIGHT? AND  
01:59:46 23 THEREFORE, IF YOU TYPE IF AN INVALID COMMAND, THEN NOTHING IS  
01:59:51 24 INVOKED, SOMETHING IS INVOKED, BECAUSE AGAIN, IN THE ARISTA  
01:59:55 25 SYSTEM, THEY DO IT DIFFERENTLY.

01:59:57 1           EITHER ONE OF THESE TWO FAILURES WOULD BE ENOUGH TO DEFEAT  
02:00:03 2           INFRINGEMENT. BUT THERE'S TWO. THEY ONLY REALLY ADDRESSED ONE  
02:00:06 3           THIS MORNING, AND NOT THE SECOND ONE. BUT AGAIN HERE, THE  
02:00:09 4           EXPERTS ARE CLEAR ON THE SECOND ONE THAT THAT'S HOW THE SYSTEM  
02:00:13 5           WORKS. IT DOESN'T MEET THE REQUIREMENTS SET FORTH BY THE  
02:00:16 6           COURT.

02:00:31 7           I THINK YOU KNOW HOW I FEEL ABOUT DAMAGES, HAVING LISTENED  
02:00:34 8           TO THE FIRST HOUR AND TEN MINUTES OF THIS, THAT PROBABLY IS  
02:00:37 9           CLEAR. THAT BECAUSE THERE'S NO INFRINGEMENT, AND BECAUSE  
02:00:41 10          THERE'S FAIR USE, AND BECAUSE THERE'S NO PATENT INFRINGEMENT,  
02:00:45 11          THERE'S NO DAMAGES DUE.

02:00:47 12          BUT OBVIOUSLY, THAT'S A DECISION THAT'S LEFT UP TO YOU AS  
02:00:50 13          JURORS IN OUR GREAT SYSTEM.

02:00:54 14          SO I WILL SAY A COUPLE THINGS ABOUT IT, WHICH IS ONE --  
02:00:57 15          CAN I HAVE THE NEXT SLIDE. WITH RESPECT TO THE COPYRIGHT CASE,  
02:01:01 16          IF YOU WERE TO FIND INFRINGEMENT, THE ONLY NUMBER THAT HAS ANY  
02:01:06 17          EVEN ARGUABLE SUPPORT IN THE EVIDENCE IS THIS \$2 MILLION FROM  
02:01:10 18          MS. ELSTEN, NOT THE \$331 MILLION NUMBER FOR 40-YEAR OLD  
02:01:15 19          TECHNOLOGY, COME ON, THAT'S CRAZY.

02:01:17 20          AND WHAT'S THE BIG DIFFERENCE? DR. CHEVALIER IS ASSIGNING  
02:01:22 21          CREDIT TO ALL OF MICROSOFT, FACEBOOK, GOOGLE, AND ALL THESE BIG  
02:01:28 22          GUYS, WHICH YOU HEARD FROM MR. SADANA, AND MR. SUMMERS AND JUST  
02:01:32 23          KIND OF OBVIOUS IN THE EVIDENCE, WHEN YOU ARE RUNNING A DATA  
02:01:36 24          CENTER WITH THOUSANDS AND THOUSANDS AND SOMETIMES MILLIONS OF  
02:01:41 25          SERVERS, YOU HAVE TO AUTOMATE.



02:01:43 1 SO IT MAKES LESS DIFFERENCE TO THEM WHAT THE CLI LOOKS  
02:01:46 2 LIKE. THEY MAY STILL USE IT, BUT IT'S NOT SOMETHING WHERE THEY  
02:01:49 3 ARE INSISTING THAT IT BE SOME FAMILIAR, COMMON CISCO-LIKE CLI.

02:01:55 4 THAT'S THE INDUSTRY MOVING AWAY FROM THAT. IF YOU LOOK  
02:01:58 5 JUST AT THOSE OLDER CUSTOMERS IN ENTERPRISE SHOPS THAT WANT TO  
02:02:02 6 KEEP USING IT, THAT'S THE ONLY NUMBER THAT MAKES ANY SENSE.

02:02:06 7 AND THE SAME IS TRUE ON THE DISGORGEMENT SIDE, IF YOU GET  
02:02:10 8 THERE, AND THAT IS, DR. CHEVALIER WASN'T EVEN WILLING TO POST A  
02:02:15 9 NUMBER, NOT WILLING TO POST A NUMBER. AND I'M NOT SAYING THIS  
02:02:17 10 NUMBER IS RIGHT, AND I DON'T THINK MS. ELSTEN IS SAYING IT'S  
02:02:21 11 RIGHT, BUT WHAT SHE'S SAYING IS IF YOU TAKE AWAY THE VALUE OF  
02:02:25 12 ALL THE OTHER THINGS IN THE DEVICE, THE HARDWARE THAT  
02:02:29 13 MR. HOLBROOK TALKED ABOUT AND MR. DUDA, THE EOS SOFTWARE WITH  
02:02:34 14 MILLIONS OF LINES OF ORIGINAL CODE, THE INTEGRATION THEY'VE  
02:02:39 15 DONE ABOUT THE LINUX KERNEL, IF YOU TAKE AWAY ALL THOSE OTHER  
02:02:43 16 FACTORS AND YOU TRY TO JUST FIND A VALUE AND YOU CAN ATTRIBUTE  
02:02:47 17 TO THE COMMANDS AT ISSUE, THAT'S THE VALUE THAT SHE POSTED.  
02:02:52 18 16.4 MILLION.

02:02:53 19 AGAIN, I'M NOT SAYING IT'S RIGHT, I'M SAYING IT'S THE ONLY  
02:02:56 20 NUMBER WITH ANY EVEN CLOSE SUPPORT IN THE EVIDENCE.

02:03:01 21 SO AS JUDGE FREEMAN TOLD YOU, YOU SHOULD DECIDE THIS CASE  
02:03:06 22 BASED ON THE EVIDENCE. AND AS I'VE TRIED TO SHOW, I THINK THE  
02:03:10 23 EVIDENCE IS OVERWHELMING ON EACH OF THESE FOUR POINTS, THAT  
02:03:15 24 THIS SWITCH WAS BUILT INDEPENDENTLY AND IS NOT A COPY, THAT  
02:03:19 25 CISCO MADE A CONSCIENCE DECISION TO PROMOTE THE CLI AS INDUSTRY

02:03:23 1 STANDARD, THAT COPYING UNPROTECTED, ROUTINE, NONORIGINAL  
02:03:29 2 ELEMENTS IS NOT INFRINGEMENT, AND THE USE OF THESE WAS A FAIR  
02:03:34 3 USE, ESPECIALLY IN LIGHT OF THE CONDUCT OF CISCO FOR YEARS IN  
02:03:40 4 THE MARKETPLACE.

02:03:41 5 I WOULD SAY ALSO THAT THE IMPORTANCE OF FAIR USE IS THAT  
02:03:45 6 IT TAKES INTO ACCOUNT THE PUBLIC INTEREST. AND THE PUBLIC  
02:03:47 7 INTEREST WE ARE TALKING ABOUT IS INNOVATION. INNOVATION IS  
02:03:51 8 CRITICAL IN OUR COMMUNITY ESPECIALLY IT'S ONE OF THE THING THAT  
02:03:54 9 IS SETS USA PART.

02:03:56 10 SO AS YOU DELIBERATE OVER THE EVIDENCE, I WOULD YOU ASK  
02:03:58 11 YOU TO KEEP IN MIND THE IMPORTANCE OF MAINTAINING A CLIMATE  
02:04:02 12 WHERE INNOVATION CAN HAPPEN. SOMEONE LIKE CISCO CAN'T CHANGE  
02:04:06 13 THE RULES AFTER BEING OUT THERE FOR YEARS, AND YEARS, AND YEARS  
02:04:09 14 SAYING WE COMPETE ON WHAT'S INSIDE THE BOX, NOT ON THE COMMON,  
02:04:13 15 OLD 40-YEAR OLD COMMAND LINE SYSTEM, IT'S NOT FAIR TO ANYONE TO  
02:04:18 16 TURN AROUND YEARS LATER AND SAY, NO, WE ARE GOING TO CHANGE THE  
02:04:21 17 RULES NOW, AND YOU, ARISTA, ALONE, ARE GOING TO BE THE ONE THAT  
02:04:24 18 HAS TO CHANGE.

02:04:25 19 THAT'S NOT FAIR. THAT'S NOT RIGHT. THAT'S WHAT FAIR USE  
02:04:27 20 WAS INTENDED TO PROTECT. AND PRODUCTS LIKE THIS AND COMPANIES  
02:04:30 21 LIKE THIS AND CHANGE LIKE THIS IS WHAT WE SHOULD BE ENCOURAGING  
02:04:35 22 IN OUR COUNTRY, NOT DISCOURAGING, AS CISCO WOULD LIKE.

02:04:38 23 NOW I KNOW MR. NELSON WILL GET A CHANCE TO RESPOND. I  
02:04:41 24 KNOW THAT HE WILL POINT OUT SOMETHING I FORGOT, SOMETHING I  
02:04:44 25 DIDN'T MENTION, MAYBE SOMETHING HE SAYS I GOT WRONG, AND I'M

02:04:49 1 COUNTING ON YOU TO REMEMBER THE KEY POINTS THAT WE HAVE BEEN  
02:04:52 2 PRESENTED, AND WE LOOK VERY MUCH FORWARD TO YOUR DELIBERATIONS  
02:04:55 3 AND VERDICT.

02:04:56 4 THANK YOU VERY MUCH, LADIES AND GENTLEMEN.

02:04:58 5 THE COURT: THANK YOU, MR. VAN NEST.

02:05:01 6 MR. VAN NEST: THANK YOU, YOUR HONOR.

02:05:05 7 THE COURT: MR. NELSON, I THINK WE WON'T NEED A  
02:05:07 8 BREAK, BUT I KNOW WE MAY WANT TO TAKE SOME THINGS AND MOVE THEM  
02:05:14 9 AROUND A LITTLE BIT.

02:05:42 10 **CLOSING ARGUMENTS BY MR. NELSON**

02:05:46 11 ALL RIGHT. GOOD AFTERNOON, EVERYBODY.

02:05:49 12 SO I'M NOT GOING TO RESPOND TO EVERY POINT, OBVIOUSLY I  
02:05:51 13 HAVE 20 MINUTES HERE, BUT I WANT TO RESPOND TO A FEW OF THE KEY  
02:05:55 14 THINGS BECAUSE I THINK IT'S IMPORTANT TO PUT THESE THINGS INTO  
02:05:58 15 CONTEXT.

02:05:59 16 AND ALSO REMEMBER WHAT THE LAWYERS SAY ARE NOT EVIDENCE.  
02:06:02 17 WHAT YOU HEARD THERE, RATHER THAN CITATIONS TO EXHIBITS, AS YOU  
02:06:05 18 HAVE, AS I DID, AFTER EXHIBIT, AFTER EXHIBIT, YOU HEARD A LOT  
02:06:08 19 OF TESTIMONY FROM MR. VAN NEST.

02:06:10 20 SO LET ME ADDRESS SOME OF THESE POINTS.

02:06:14 21 FIRST, I WANT TO TALK ABOUT THIS INDUSTRY STANDARD POINT.  
02:06:17 22 WHEN YOU GO BACK AND LOOK AT THOSE JURY INSTRUCTIONS, YOU WON'T  
02:06:20 23 SEE ONE SINGLE INSTRUCTION THAT SAYS BECAUSE SOMEBODY PROMOTES  
02:06:22 24 SOMETHING OR SAYS THAT IT'S AN INDUSTRY STANDARD, THAT IT'S  
02:06:26 25 FREE.

02:06:26 1 AND YOU DIDN'T HEAR A SINGLE WITNESS TESTIFY TO THAT. YOU  
02:06:29 2 DIDN'T SEE A SINGLE DOCUMENT TO THAT EFFECT. YOU DIDN'T EVEN  
02:06:32 3 HAVE ANYBODY TELL YOU WHAT INDUSTRY STANDARD MEANT IN THAT  
02:06:36 4 CONTEXT IN ANY KIND OF CONSISTENT FASHION.

02:06:39 5 BUT WE KNOW WHAT ARISTA THOUGHT INDUSTRY STANDARD MEANT.  
02:06:47 6 THIS TESTIMONY COMES FROM MR. SADANA. YOU WILL RECALL THAT --  
02:06:51 7 IT'S SLIDE 119.

02:07:01 8 ALL RIGHT. HERE WE GO, THIS IS TESTIMONY FROM MR. SADANA.  
02:07:04 9 NOW COUNSEL IS TRYING TO -- HE'S TRYING TO CONFUSE AN ISSUE,  
02:07:08 10 RIGHT?

02:07:08 11 WE HEARD ABOUT INDUSTRY STANDARD IN TERMS OF PROTOCOLS AND  
02:07:11 12 THINGS. AND BY THE WAY, INDUSTRY STANDARDS THERE ARE NOT FREE,  
02:07:15 13 YOU STILL PAY FOR THOSE FOR THE INTELLECTUAL PROPERTY THAT'S IN  
02:07:19 14 THOSE, THAT'S JUST DEFINING WHAT THE PROTOCOLS ARE GOING TO BE  
02:07:22 15 SO THAT THEY CAN COMMUNICATE. BUT YOU STILL PAY FOR THAT. SO  
02:07:26 16 I'M NOT SURE WHERE THAT COMES FROM.

02:07:28 17 BUT WE KNOW THAT ARISTA, MR. SADANA ACTUALLY SAID WHEN  
02:07:31 18 THEY USE THE TERM INDUSTRY STANDARD, IT JUST MEANS WHAT'S  
02:07:34 19 POPULAR IN THE INDUSTRY. THAT'S ALL, THAT'S IT. PERIOD. IT'S  
02:07:38 20 WHAT'S POPULAR IN THE INDUSTRY.

02:07:39 21 AND IN FACT, YOU WILL RECALL, HE ACTUALLY SAID THAT WELL,  
02:07:42 22 CISCO MAY BE AN INDUSTRY STANDARD, JUNOS, THAT'S AN INDUSTRY  
02:07:45 23 STANDARD, HE ALSO SAID ARISTA WAS AN INDUSTRY STANDARD, RIGHT?  
02:07:49 24 IN CERTAIN INDUSTRIES.

02:07:51 25 SO THIS IS JUST A TERM THAT PEOPLE USE, A MARKETING TERM

02:07:54 1 THAT SAYS, YEAH, WE ARE POPULAR. YOU KNOW, WE ARE KIND OF A  
02:07:57 2 MARKET LEADER, WE ARE KIND OF THE GOLD STANDARD.

02:07:59 3 AND HERE, THEIR OWN DOCUMENT, THIS IS EXHIBIT 28, IT'S AN  
02:08:05 4 IMPORTANT ONE TO LOOK AT, AND I HAVE UNDERLINED HERE AN E-MAIL  
02:08:09 5 FROM 2014, IT SAYS "JUNIPER JUNOS IS DIFFERENT ENOUGH FROM  
02:08:15 6 INDUSTRY STANDARD." THEN IT DEFINES WHAT THEY MEAN BY INDUSTRY  
02:08:18 7 STANDARD, MEANING WHATEVER CISCO DID, RIGHT?

02:08:20 8 THIS ISN'T SOME TERM THAT SAYS OH, THIS IS WHAT EVERYBODY  
02:08:23 9 IN THE INDUSTRY IS DOING, WHICH WAS WHAT YOU HEARD OVER, AND  
02:08:26 10 OVER, AND OVER AGAIN FROM MR. VAN NEST.

02:08:30 11 IN FACT, WHAT ELSE DID WE HEAR? THIS IS EXHIBIT 166  
02:08:35 12 AGAIN. MR. DALE TESTIFIED TO THIS. IT'S THEIR JOKE FOR SAYING  
02:08:38 13 IT'S THE SAME AS IOS. IT'S NOT A STATEMENT THAT SAYS WE THINK  
02:08:42 14 THIS IS FREE TO USE, WE THINK EVERYBODY CAN USE THIS, BUT  
02:08:46 15 THAT'S WHAT YOU HEARD HERE.

02:08:48 16 NOW, LET ME TALK ABOUT MR. VOLPI A LITTLE BIT. YOU HEARD  
02:08:53 17 A LOT OF TESTIMONY FROM MR. -- EXCUSE ME, A LOT OF RECITATION,  
02:08:57 18 PARAPHRASING OF TESTIMONY FROM MR. VOLPI.

02:08:59 19 MR. VOLPI DID NOT SAY THAT THERE HAD EVER BEEN A POLICY  
02:09:03 20 WITHIN CISCO THAT SAYS YOU CAN FREELY USE OUR CLI, OUR  
02:09:08 21 COMMAND-LINE INTERFACE, IN FACT, YOU SEE HERE I ASKED HIM THE  
02:09:10 22 QUESTION, "YOU CAN FREELY USE OUR CLI, RIGHT?"

02:09:15 23 I SHOULD START BACK, "AND SO YOU DON'T RECALL ANY  
02:09:16 24 STATEMENTS BY CISCO WHILE YOU WERE THERE SAYING HEY, YOU CAN  
02:09:19 25 USE -- YOU CAN FREELY USE OUR CLI, RIGHT?"

02:09:22 1 "NO, I DON'T RECALL ANY SUCH STATEMENTS."

02:09:26 2 THERE WAS NOT A SINGLE WITNESS OR DOCUMENT THAT THEY PUT  
02:09:29 3 IN FRONT OF YOU THAT SAID CISCO HAS A POLICY THAT SAYS YOU CAN  
02:09:32 4 FREELY USE OUR USER INTERFACE, OUR COMMAND-LINE INTERFACE.

02:09:36 5 AND MOREOVER, YOU MAY RECALL FROM MR. VOLPI, WHEN I ASKED  
02:09:39 6 HIM SOME QUESTIONS ON CROSS-EXAMINATION, HE SAID HE NEVER  
02:09:43 7 LOOKED AT WHAT OVERLAP WAS BETWEEN COMPETITORS, RIGHT? OTHER  
02:09:48 8 COMPANIES OUT THERE IN THE MARKET, NEVER LOOKED AT THAT BETWEEN  
02:09:50 9 THAT AND CISCO, AND WASN'T AWARE OF ANYBODY AT CISCO LOOKING AT  
02:09:54 10 THAT.

02:09:55 11 SO AGAIN, THESE ARE JUST GENERAL STATEMENTS THAT ARE MADE  
02:09:57 12 OUT OF THERE THAT ARISTA IS TRYING TO BLOW INTO SOME KIND OF  
02:10:02 13 IDEA THAT THEY CAN JUST FREELY USE THIS. AND IT'S SIMPLY NOT  
02:10:06 14 THE CASE.

02:10:07 15 MR. KATHAIL TESTIFIED, AND HE TOLD YOU WHAT HE MEANT.  
02:10:10 16 AGAIN, THIS IS WHAT MR. SADANA TOLD YOU. THIS IS WHAT THESE  
02:10:14 17 TERMS ARE. IT'S THE BEST OF BREED, SOMETHING TO COMPETE  
02:10:18 18 AGAINST. IT'S NOT SOMETHING THAT'S FREE.

02:10:23 19 NOW HERE I WANT TO PAUSE FOR A MINUTE. THERE WAS A LOT  
02:10:26 20 OF -- I THINK A BIG PART OF COUNSEL'S ARGUMENT ON THIS, FOCUSED  
02:10:31 21 ON MR. GIANCARLO AND STATEMENTS FROM MR. GIANCARLO.

02:10:34 22 HE SAYS, MR. GIANCARLO ACTUALLY SAID THAT OH, WE THOUGHT  
02:10:37 23 THE CLI WAS FREE TO USE AND NOT PROTECTABLE. THIS IS  
02:10:41 24 MR. GIANCARLO'S SWORN DECLARATION.

02:10:44 25 YOU WILL RECALL, I ASKED HIM ABOUT THIS, SWORN UNDER

02:10:47 1 PENALTY OF PERJURY TO THE COURT WHERE HE SAYS, CISCO'S  
02:10:52 2 PROPRIETARY IOS IS ONE OF THE COMPANY'S MOST VALUABLE ASSETS.  
02:10:56 3 THE SAME HOLDS TRUE FOR THE CLI USER INTERFACE. AND THIS  
02:11:00 4 INTERFACE WHICH IS UNIQUE TO CISCO, HAS BEEN DEVELOPED OVER  
02:11:03 5 MANY YEARS THROUGH THE EXPENDITURE BY CISCO OF HUNDREDS OF  
02:11:06 6 MILLIONS OF DOLLARS.

02:11:07 7 THAT'S WHAT HE SAID, THAT'S WHAT HE DECLARED. NOW HE WENT  
02:11:10 8 UP ON THE STAND AND SAID, WELL, I'M NOT REALLY SURE IF I READ  
02:11:14 9 THIS. FIRST, HE SAID YES, I READ IT VERY CAREFULLY, I  
02:11:16 10 UNDERSTOOD IT. AND THEN HE SAID, I'M NOT SURE IF I READ IT.

02:11:19 11 NOW HE COULDN'T PRODUCE TO YOU A SINGLE DOCUMENT WHERE HE  
02:11:22 12 HAD EVER MADE THE STATEMENT THAT SAID -- SINCE THIS  
02:11:26 13 DECLARATION, THAT SAID, WELL, I BELIEVE THAT THE USER INTERFACE  
02:11:29 14 AT CISCO WAS FREE TO USE. NOT A SINGLE ONE.

02:11:32 15 BUT NOW THAT HE IS AN ARISTA BOARD MEMBER, ARISTA WILL SAY  
02:11:38 16 HIS TESTIMONY IS SAYING WELL, THAT'S WHAT I BELIEVED ALL ALONG.  
02:11:41 17 DESPITE WHAT I SWORE TO THE COURT UNDER PENALTY OF PERJURY IN  
02:11:45 18 2003 IN THE HUAWEI CASE.

02:11:49 19 AND THIS IS ALSO AN IMPORTANT THING. THIS IS THE  
02:11:52 20 GENTLEMAN FROM HP TESTIFIED. I THINK THERE WAS SOME  
02:11:56 21 REPRESENTATIONS MADE BY ARISTA'S COUNSEL THAT SAID, WELL,  
02:12:01 22 EVERYBODY OUT THERE UNDERSTANDS THAT THERE'S A COMMON SET OF  
02:12:04 23 COMMANDS, THAT'S NOT WHAT HE SAID AT ALL, RIGHT?

02:12:07 24 IN FACT, THIS WAS QUESTIONING FROM ARISTA'S COUNSEL ON THE  
02:12:12 25 REDIRECT EXAMINATION. AND IT WAS ASKED, YOU TESTIFIED ABOUT A

02:12:16 1 COMMON SET OF STANDARD COMMANDS. WHAT DID YOU MEAN BY A COMMON  
02:12:20 2 SET OF STANDARD COMMANDS?

02:12:22 3 AND HERE, IF YOU GO FURTHER DOWN, HE SAYS, YOU KNOW, HE'S  
02:12:26 4 TALKING ABOUT THE INTENDED BEHAVIOR OF THE ROUTERS AND  
02:12:29 5 SWITCHES.

02:12:29 6 IN OTHER WORDS, WHAT KIND OF THINGS THEY DO, IT'S  
02:12:31 7 EXPECTED THAT THOSE THINGS BE THE SAME. BUT HE SAYS VERY  
02:12:35 8 EXPLICITLY, THE SYNTAX MAY VARY, BUT WHAT YOU EXPECT THE ROUTER  
02:12:39 9 AND THE SWITCH TO DO IS QUITE CONSISTENT.

02:12:41 10 SO THERE WAS NO TESTIMONY FROM THE GENTLEMAN FROM HP  
02:12:46 11 SAYING WELL, THIS IS A COMMON SET OF COMMANDS THAT EVERYONE OUT  
02:12:50 12 THERE USES AND THEREFORE WE BELIEVE EVERYBODY CAN USE. IN  
02:12:54 13 FACT, HE SAID IT IS OPPOSITE. THE SYNTAX VARIES. IT'S  
02:12:57 14 DIFFERENT FROM COMPANY TO COMPANY.

02:13:00 15 AND WE KNOW THAT'S THE CASE BECAUSE WE SAW DR. BLACK'S  
02:13:03 16 DATA WHERE THE VAST MAJORITY OF THESE COMMANDS ARE NOT USED BY  
02:13:07 17 THE VAST MAJORITY OF COMPANIES OUT THERE, EVEN FROM HIS  
02:13:10 18 HAND-SELECTED GROUP OF COMPANIES.

02:13:12 19 SO TO SUGGEST, TO COME IN AND SUGGEST THAT THEY BELIEVE,  
02:13:18 20 MEANING ARISTA, THAT THEY CAN USE THESE BECAUSE EVERYBODY ELSE  
02:13:21 21 IS OUT THERE DOING IT IS SIMPLY NOT SUPPORTED BY THE EVIDENCE,  
02:13:24 22 THAT'S JUST AN AFTER-THE-FACT ARGUMENT BY THE ATTORNEYS.

02:13:28 23 NOW, THERE WAS SOME STATEMENTS ABOUT ARISTA HAS  
02:13:35 24 TRANSFORMED AND ARISTA DID THIS ALL FROM SCRATCH. THAT'S NOT  
02:13:40 25 TRUE, RIGHT? HERE'S A DOCUMENT THAT I DISCUSSED WITH



MR. SADANA AS WELL. THE THIS IS EXHIBIT 3623, WHICH IS A "WHO WANTS WHAT" SPREADSHEET. AND WE WENT THROUGH THESE.

AND THERE ARE MANY THINGS THAT ARE WELL BEYOND ANY KIND OF USER INTERFACE FUNCTIONALITY WHERE THE REFERENCE IN THESE DOCUMENTS ARE, GO TO CISCO, LOOK AT CISCO, MIMIC CISCO, COPY CISCO.

THERE WAS NOT ONE STATEMENT BY ARISTA'S COUNSEL IN THEIR CLOSING ARGUMENT ABOUT THIS DOCUMENT OR WHAT THIS MEANS.

ANOTHER THING THAT'S BEEN CHANGED, IT WAS FLIPPED OVER ON THE BOARD, BUT IT TALKED ABOUT TRANSFORMATIVE USE BEING THE WRAPPER THAT'S PLACED AROUND THESE CLI'S, I BELIEVE, AND HE POINTED TO THE BOARD THAT DR. BLACK DREW.

WELL, THAT'S EXHIBIT 187, I ALREADY TALKED ABOUT IT, THAT WAS COPIED FROM CISCO. SO HOW CAN IT BE THAT IT'S TRANSFORMATIVE WHEN THEY COPIED THAT FROM CISCO AS WELL?

NOW, THERE'S ANOTHER ATTEMPT HERE TO DISTRACT, RIGHT? WHEN WE ARE TALKING ABOUT TRANSFORMATION HERE, WE ARE NOT TALKING ABOUT TRANSFORMATION OF THE COMPANY OR WE ARE TALKING ABOUT, WELL, DID I MAKE A BETTER PRODUCT OR A WORSE PRODUCT. WE CAN COME IN HERE, AND WE KNOW FROM THE TESTIMONY THAT THESE COMPANIES SELL HEAD-TO-HEAD ALL THE TIME, AND CISCO WINS SOME DEALS AND ARISTA WINS SOME DEALS. WE KNOW THAT'S THE CASE. WE HEARD THAT TESTIMONY.

BUT THAT'S NOT THE QUESTION WHEN WE ARE TALKING ABOUT WHETHER THERE'S A TRANSFORMATIVE USE. WHAT WE ARE TALKING

02:15:12 1 ABOUT IS DID YOU TRANSFORM THE WORK, RIGHT? DID YOU MAKE IT  
02:15:16 2 DIFFERENT, MAKE IT A NEW EXPRESSION, THAT'S WHAT WE ARE TALKING  
02:15:19 3 ABOUT HERE AND THAT'S WHAT THE INSTRUCTION WILL IT TELL YOU.

02:15:21 4 YOU DIDN'T HEAR ANY ARGUMENT ABOUT THAT. WHAT YOU HEARD  
02:15:24 5 WAS KIND OF A SHINY OBJECT TRICK, LOOK OVER HERE, WE MADE A LOT  
02:15:27 6 OF CHANGES OVER HERE THAT HAVE NOTHING TO DO WITH THE WORK, BUT  
02:15:31 7 WE USED THE WORK IN EXACTLY IN THE MANNER IT WAS INTENDED TO BE  
02:15:35 8 USED FOR EXACTLY THE PURPOSE SO THAT WE COULD TARGET CISCO'S  
02:15:38 9 CUSTOMERS.

02:15:39 10 THAT'S NOT A TRANSFORMATION. THAT'S LIKE -- I TALKED WITH  
02:15:42 11 DR. BLACK ABOUT THIS A BIT. THAT'S LIKE SAYING I HAVE A BOOK,  
02:15:47 12 RIGHT, I WROTE A BOOK, AND NOW SOMEBODY COMES ALONG AND SAYS  
02:15:51 13 WELL I'M GOING TO PUT IT ON THE IPAD.

02:15:53 14 IN FACT, WE HAD THAT DISCUSSION, AND THERE WAS SOME DEBATE  
02:15:57 15 FROM DR. BLACK THAT OH, THAT COULD BEING TRANSFORMATION.

02:16:01 16 AND THAT'S WHAT THEY ARE TALKING ABOUT. THEY ARE TALKING  
02:16:02 17 ABOUT I TAKING THE SAME WORK AND PUTTING IT ON THE IPAD AND  
02:16:06 18 SAYING, IT'S BETTER, THAT'S A BETTER WAY THAT PEOPLE LIKE TO  
02:16:09 19 LOOK AT IT, LIKE TO INTERACT WITH IT BETTER AND CARRY IT  
02:16:12 20 AROUND. THAT'S NOT TRANSFORMATION UNDER THE LAW.

02:16:15 21 NOW, LET ME ADDRESS THIS POINT ABOUT THE DELAY. ACTUALLY,  
02:16:22 22 NO, I WANT TO TALK ABOUT THIS, I'M SORRY.

02:16:24 23 THIS DOCUMENT IS ALSO AN IMPORTANT ONE, AND I TALKED ABOUT  
02:16:29 24 THIS WITH MR. SADANA AS WELL. THIS IS EXHIBIT 842. YOU GO  
02:16:33 25 BACK THERE. AND YOU WILL RECALL THIS DOCUMENT IS TALKING ABOUT

02:16:37 1 LOOKING AT PARTICULAR CISCO THINGS. AND IT SAYS, "IT HAS SOME  
02:16:40 2 GOOD POINTS. WE COPY CISCO FOR EVERYTHING ELSE..."

02:16:46 3 WE SEE THESE DOCUMENTS OVER, AND OVER, AND OVER AGAIN. SO  
02:16:51 4 TO SUGGEST THAT THIS IS ALL DONE ON A CLEAN SLATE IS JUST NOT  
02:16:54 5 CONSISTENT WITH THE EVIDENCE WE'VE SEEN.

02:16:56 6 NOW LET'S TALK ABOUT THIS DELAY POINT. ARISTA'S COUNSEL  
02:17:01 7 SPENT A LOT OF TIME FOCUSED ON SOME TESTING THAT WAS DONE IN  
02:17:05 8 2009, AND SOME TESTIMONY FROM MR. GOURLAY; DO YOU RECALL THAT?  
02:17:10 9 WHERE HE SAID LOOK, WE HAD A SWITCH AND WE WERE LOOKING AT IT  
02:17:14 10 IN 2009.

02:17:16 11 BUT WHAT DO YOU SEE FOR 2009? REMEMBER THIS WAS ARISTA,  
02:17:22 12 THEY WERE VERY EARLY ON IN THE GAME, THEY WERE A LOW LATENCY  
02:17:26 13 CUSTOMER. THEY HAD 50 COMMANDS. BOTH MR. DUDA AND MR. SADANA  
02:17:30 14 TESTIFIED YEAH, THAT WAS A VERY FEW FEATURES IN THAT PRODUCT,  
02:17:34 15 NOT MUCH WAS THERE.

02:17:35 16 SO THAT'S WHAT HE'S TALKING ABOUT ARE A TIME WHEN THERE  
02:17:38 17 WAS 50 COMMANDS AND SAYING, WELL, YOU SHOULD HAVE KNOWN THAT  
02:17:41 18 ARISTA WAS A BLATANT VIOLATOR, BACK WHEN YOU LOOKED IN 2009.

02:17:45 19 BUT THAT'S NOT WHAT HAPPENED, RIGHT? BACK THEN IT WAS 50.  
02:17:48 20 WHAT HAPPENS LATER AFTER 2011, 2012, WELL, THEY KEEP ADDING  
02:17:53 21 COMMANDS AS THEY ADD FUNCTIONALITY.

02:17:56 22 SO IT'S NOT UNTIL THE 2012, 2013 YOU CAN SEE IN THIS CHART  
02:18:01 23 THAT THEY START GETTING UP OVER 250, 350, 450, UP TO 500-SOME  
02:18:08 24 COMMANDS.

02:18:09 25 SO TO SUGGEST THAT THIS IS SOMETHING THAT CISCO SHOULD

02:18:11 1 HAVE BEEN AWARE OF BACK IN 2009, BASED UPON SOME TESTING THAT  
02:18:15 2 OCCURRED WHEN THERE WAS ONLY 50 COMMANDS IS VERY MISLEADING.

02:18:22 3 AND LET'S TALK A BIT ABOUT DELL HERE. BECAUSE THERE'S A  
02:18:27 4 BIG DIFFERENCE, RIGHT? AND I WILL GET INTO A LITTLE BIT ABOUT  
02:18:30 5 THE DELL COMMANDS AND THE SUPPOSE ED OVERLAP THAT THEY HAVE,  
02:18:34 6 BUT DELL WAS VERY CLEAR THAT THEY DIDN'T COPY CISCO, RIGHT?

02:18:38 7 AND THERE'S -- THEY WERE EXPLICIT ON THAT POINT. THERE  
02:18:42 8 WAS NOBODY OUT THERE, AND YOU HAVEN'T SEEN A SINGLE DOCUMENT  
02:18:46 9 OTHER THAN THE ONES WE PRODUCED OVER AND OVER AGAIN FROM ARISTA  
02:18:50 10 WHERE SOMEBODY WAS OUT THERE SAYING, WE'VE COPIED CISCO, WE ARE  
02:18:53 11 THE SAME AS CISCO. IT WAS ONLY ARISTA, ARISTA WAS THE OUTLIER.

02:19:00 12 AND NOW LET ME TALK ABOUT THIS DELL. THIS IS  
02:19:04 13 EXHIBIT 9049. AND YOU HEARD THIS TESTIMONY FROM DR. ALMEROTH.  
02:19:07 14 FIRST, REMEMBER WHAT DR. BLACK DID? HE WENT AND PUT A BUNCH OF  
02:19:12 15 DIFFERENT COMPANIES TOGETHER, A BUNCH OF DIFFERENT PRODUCTS  
02:19:15 16 OVER MANY YEARS AND SAID, WELL, I FOUND THESE COMMANDS, AND  
02:19:19 17 THEREFORE THAT'S THE OVERLAP, RIGHT? THAT'S WHAT HE SAID. HE  
02:19:24 18 NEVER SAID, WELL, THIS WAS WHAT WAS IN ONE PRODUCT OR THIS WAS  
02:19:28 19 FROM ONE COMPANY.

02:19:29 20 BUT WHAT ELSE DID DR. ALMEROTH SAY? HE SAID THAT HE'S  
02:19:33 21 DOUBLED, TRIPLE COUNTED THESE COMMANDS. AND WE CAN SEE RIGHT  
02:19:37 22 HERE IN THE -- THIS IS ON THE FIRST PAGE.

02:19:40 23 SO WE HAVE -- FOR EXAMPLE, IF YOU GO TO LINE 23 AND YOU GO  
02:19:44 24 TO LINE 29, SO THAT'S 11, IT'S THE SAME COMMAND. "AREA NSSA"  
02:19:50 25 IS THE COMMAND. THESE OTHER THINGS THAT ARE THERE ARE

02:19:52 1 PARAMETERS, RIGHT? PUT THIS PARAMETER IN, PUT THAT.

02:19:55 2 HE COUNTED IT EACH TIME FOR EACH DIFFERENT PARAMETER AND  
02:19:59 3 THAT'S -- SO THAT'S SEVEN. THIS IS JUST THE FIRST PAGE I'M  
02:20:07 4 TALKING ABOUT. WE DROP A LITTLE BIT DOWN TO 32, DOWN TO 40, SO  
02:20:11 5 THAT'S NINE TIMES EXACTLY THE SAME COMMAND. WHICH SAYS "AREA  
02:20:15 6 VIRTUAL LINK." THAT'S THE COMMAND.

02:20:17 7 SO AS DR. ALMEROTH SAID, THIS EVIDENCE BESIDES BEING A  
02:20:21 8 POOR SAMPLE IS EXTREMELY MISLEADING BECAUSE YOU JUST -- ALL  
02:20:26 9 THEY DID WAS COUNT THE SAME COMMAND. WE'RE WE ARE ON THE FIRST  
02:20:29 10 PAGE, THESE TWO COMMANDS THAT SHOULD BE TWO, ARE 16.

02:20:33 11 NOW, ARISTA ALSO IN 2010, THEY WANT TO TELL YOU THAT  
02:20:45 12 EVERYONE OUT THERE, REMEMBER A LOT OF THESE PEOPLE CAME FROM  
02:20:49 13 CISCO. EVERYONE OUT THERE WAS DOING THE SAME THING. NOW THEY  
02:20:52 14 TESTIFIED THAT THEY NEVER LOOKED AT THAT.

02:20:54 15 BUT GO BACK TO EXHIBIT 6095 AND LOOK AT THAT. THIS IS HOW  
02:20:58 16 THEY ARE DESCRIBING TESTING. HERE FOR DELL, THEY WANT TO COME  
02:21:01 17 IN THE AND SAY DELL HAS GOT WAY MORE OVERLAP THAN WE DO. BUT  
02:21:05 18 BACK IN 2010 WHEN THEY WERE LOOKING AT THE RESULTS, THEY SAID  
02:21:08 19 DELL IS NOT CONSISTENT WITH IOS.

02:21:09 20 IN OTHER WORDS, IT'S NOT CISCO-LIKE, IT'S NOT A COPY LIKE  
02:21:13 21 US, IT'S DIFFERENT AND WE CAN SELL OURS THAT WAY.

02:21:15 22 SO IN THE END, ON THIS PROTECTABILITY POINT, I WANT TO  
02:21:24 23 TALK ABOUT JUST BRIEFLY IN MY LAST FEW MINUTES.

02:21:27 24 SO ARISTA'S COUNSEL MADE A BIG DEAL OUT OF WELL, THESE --  
02:21:34 25 THE INDIVIDUAL COMMANDS OR THE MULTIWORD COMMANDS THEMSELVES,

02:21:39 1 THEY ARE NOT PROTECTABLE. THAT'S NOT WHAT'S BEING CLAIMED,  
02:21:42 2 RIGHT? IT'S THE COLLECTION OF THESE COMMANDS.

02:21:44 3 AND WHAT DID HE PROCEED TO DO THEN? HE PROCEEDED TO SHOW  
02:21:48 4 YOU INDIVIDUAL WORDS AND SAY, WELL THIS WORD IS THERE, AND THIS  
02:21:51 5 WORD IS THERE. BUT NONE OF THAT HAS TO DO WITH THE OVERALL  
02:21:55 6 COLLECTION OF THESE COMMANDS.

02:21:56 7 HE DIDN'T ADDRESS THAT PARTICULAR ISSUE. ALL HE DID WAS  
02:21:59 8 TO SAY I CAN FIND THESE WORDS, AND I CAN LOOK AT THESE  
02:22:02 9 INDIVIDUAL COMMANDS AND, COME ON, YOU KNOW THAT THIS ISN'T  
02:22:06 10 SUPER CREATIVE.

02:22:07 11 BUT THAT'S NOT WHAT YOU ARE BEING ASKED TO DO. WHAT YOU  
02:22:09 12 ARE LOOKING AT IS THE COLLECTION OF THESE THINGS WHICH  
02:22:12 13 MR. VAN NEST NEVER DISTRESSED.

02:22:13 14 SO HE'S ASKING YOU TO DO SOMETHING DIFFERENT THAN WHAT YOU  
02:22:16 15 ARE BEING ASKED TO DO IN THE CASE.

02:22:18 16 AND REMEMBER, THERE'S NOT A SINGLE ONE OF THESE COMMANDS  
02:22:22 17 THAT WAS EVER FOUND, DESPITE ALL OF DR. BLACK'S EFFORT ANYWHERE  
02:22:27 18 BEFORE CISCO CAME UP WITH THESE THINGS. NOT A SINGLE ONE OUT  
02:22:31 19 THERE.

02:22:31 20 AND ALSO, THERE'S MANY, MANY COMPANIES OUT THERE THAT DO  
02:22:35 21 IT DIFFERENTLY. THEY DON'T USE THE SAME THINGS. THEY DON'T  
02:22:38 22 USE THE SAME COMMANDS.

02:22:40 23 SO TO SUGGEST THAT THIS IS THE ONLY WAY TO DO IT AND THIS  
02:22:44 24 ARRANGEMENT IS THE ONLY ONE WAY TO DO IT, IS SIMPLY NOT  
02:22:48 25 SUPPORTED BY THE EVIDENCE AT ALL.

02:22:50 1 NOW, I JUST WANT TO FINISH SINCE I'M OUT OF TIME HERE,  
02:22:58 2 THERE'S THIS POINT ON HELP DESCRIPTIONS. AND I NEED TO ADDRESS  
02:23:02 3 THIS POINT VERY BRIEFLY. YOU SAW SOME TESTIMONY THAT COUNSEL  
02:23:05 4 PUT UP, AND THIS IS JUST INDICATIVE OF SOME OF THE THINGS THAT  
02:23:08 5 YOU SAW DURING THIS TRIAL AND SOME OF THE THINGS YOU SAW DURING  
02:23:11 6 THIS CLOSING ARGUMENT.

02:23:12 7 COUNSEL PUT UP SOME TESTIMONY ABOUT, WELL, LOOK AT THIS  
02:23:16 8 HELP DESCRIPTION, IS THAT REALLY CREATIVE? YOU KNOW, THIS  
02:23:18 9 SINGLE HELP DESCRIPTION?

02:23:20 10 THOSE ARE HELP DESCRIPTIONS THAT YOU ARE NOT BEING ASKED  
02:23:24 11 TO LOOK AT. THOSE AREN'T ONES YOU ARE BEING ASKED TO LOOK AT  
02:23:28 12 IN THE CASE. SO THOSE WERE QUESTIONS THAT HE CHOSE TO ASK  
02:23:32 13 DR. ALMEROTH ON, THINGS THAT WEREN'T ASSERTED, AND THOSE ARE  
02:23:36 14 THINGS THAT HE CHOSE TO BRING TO YOU IN CLOSING ARGUMENT,  
02:23:39 15 AGAIN, THINGS THAT AREN'T ASSERTED.

02:23:41 16 SO WHEN YOU GO BACK IN THE JURY ROOM, THINK ABOUT THAT,  
02:23:47 17 RIGHT. THINK ABOUT WHAT THE EVIDENCE IS AND DO YOUR EVALUATION  
02:23:50 18 OF THE EVIDENCE IN LIGHT OF THE INSTRUCTIONS THAT THE COURT  
02:23:53 19 GAVE YOU, NOT THE REPRESENTATIONS FROM COUNSEL, WHETHER IT BE  
02:23:56 20 ME OR WHETHER IT BE ARISTA'S COUNSEL OF WHAT THAT LAW IS,  
02:23:59 21 THAT'S WHAT YOU ARE BEING ASKED IT ON DO, THAT'S THE IMPORTANT  
02:24:02 22 THING FOR YOU TO DO. AND IF YOU DO THAT, THAT'S ALL WE CAN DO.

02:24:06 23 AND REMEMBER, AS I SAID AT THE BEGINNING OF THIS, RIGHT  
02:24:08 24 FROM THE OUTSET IN OPENING STATEMENT, THIS IS CLOSING ARGUMENT,  
02:24:13 25 THAT WAS OPENING STATEMENT, IS LOOK AT WHAT WAS SAID OUTSIDE OF

02:24:19 1 COURT, LOOK WHAT WAS SAID BEFORE THE LAWSUIT WAS FILED.

02:24:24 2 AND REMEMBER, THE BIGGEST CONTRADICTION THAT I SEE HERE IN  
02:24:28 3 THIS CASE AND HAVE FROM THE BEGINNING IS, HOW CAN YOU, ON THE  
02:24:31 4 ONE HAND, SAY I DIDN'T TAKE MUCH, I TOOK ALMOST NOTHING, WHAT I  
02:24:35 5 TOOK WAS TRIVIAL, BUT ON THE OTHER HAND, YOU ARE TELLING  
02:24:38 6 CUSTOMERS OUT THERE, I TOOK IT ALL, I TOOK EVERYTHING I NEEDED  
02:24:42 7 SO THAT MY SWITCH IS EXACTLY LIKE YOUR SWITCH, AND IF YOU KNOW  
02:24:46 8 CISCO, YOU CAN RUN AN ARISTA SWITCH.

02:24:49 9 THOSE TWO THINGS CANNOT BE TRUE. BOTH OF THOSE THINGS  
02:24:53 10 CANNOT BE TRUE. AND THAT'S A FUNDAMENTAL PROBLEM THAT ARISTA  
02:24:58 11 HAS WITH ITS CASE. THEY CHOSE TO COME IN AND MAKE ARGUMENTS TO  
02:25:05 12 YOU THAT ARE DIFFERENT THAN WHAT THEY TOLD THEIR CUSTOMERS.

02:25:08 13 AND IN FACT, WHAT THEY WERE TELLING THEIR SALES ENGINEERS  
02:25:10 14 TO TELL CUSTOMERS WHEN THEY ARE OUT THERE, RIGHT? TELL THEM  
02:25:13 15 THAT WE ARE MORE LIKE CISCO THAN ANYBODY ELSE.

02:25:16 16 NOW WITH THAT, I BELIEVE I'M OUT OF TIME HERE, SO I WOULD  
02:25:19 17 JUST LIKE TO THANK YOU ALL, RIGHT, I KNOW IT'S A LONG TIME. I  
02:25:22 18 KNOW IT'S A LOT TO SIT THROUGH, BUT WE DO APPRECIATE IT.

02:25:25 19 IT IS IMPORTANT TO THE PROCESS, AND ALL WE CAN DO IS ASK  
02:25:30 20 YOU TO GO BACK AND LOOK AT THE EVIDENCE, LOOK AT THE LAW, AND I  
02:25:34 21 THINK RENDER A VERDICT IN OUR FAVOR BASED UPON THAT.

02:25:37 22 SO THANK YOU VERY MUCH. I REALLY DO APPRECIATE IT.

02:25:41 23 THE COURT: THANK YOU, MR. NELSON.

02:25:52 24 ALL RIGHT. NOW THAT YOU'VE HEARD THE CLOSING ARGUMENTS OF  
02:25:56 25 THE LAWYERS, I'M GOING TO READ TO YOU THE LAST OF THE JURY



02:25:59 1 INSTRUCTIONS, AND MERCIFULLY THERE ARE ONLY A FEW OF THEM. AND  
02:26:04 2 THEN I WANT TO TALK TO YOU A LITTLE BIT INFORMALLY ABOUT  
02:26:07 3 WHETHER OR NOT IT IS GOING ON GO ON IN THE JURY ROOM.

02:26:10 4 BEFORE YOU BEGIN YOUR DELIBERATIONS, ELECT ONE MEMBER OF  
02:26:13 5 THE JURY AS YOUR PRESIDING JUROR. THAT PERSON WILL PRESIDE  
02:26:17 6 OVER THE DELIBERATIONS AND SERVE AS THE SPOKES PERSON FOR THE  
02:26:19 7 JURY IN COURT.

02:26:21 8 YOU SHALL DILIGENTLY STRIVE TO REACH AGREEMENT WITH ALL OF  
02:26:26 9 THE OTHER JURORS IF YOU CAN DO SO. YOUR VERDICT MUST BE  
02:26:29 10 UNANIMOUS.

02:26:32 11 EACH OF YOU MUST DECIDE THE CASE FOR YOURSELF. BUT YOU  
02:26:35 12 SHOULD DO SO ONLY AFTER YOU HAVE CONSIDERED ALL OF THE  
02:26:38 13 EVIDENCE, DISCUSSED IT FULLY WITH THE OTHER JURORS, AND  
02:26:41 14 LISTENED TO THEIR VIEWS.

02:26:43 15 IT IS IMPORTANT THAT YOU ATTEMPT TO DO REACH A UNANIMOUS  
02:26:46 16 VERDICT, BUT OF COURSE, ONLY IF EACH OF YOU CAN DO SO AFTER  
02:26:51 17 HAVING MADE YOUR OWN CONSCIENTIOUS DECISION.

02:26:55 18 DO NOT BE UN WILLING TO CHANGE YOUR OPINION IF THE  
02:26:58 19 DISCUSSION PERSUADES YOU THAT YOU SHOULD. BUT DO NOT COME TO A  
02:27:02 20 DECISION SIMPLY BECAUSE OTHER JURORS THINK IT IS RIGHT. OR  
02:27:06 21 CHANGE AN HONEST BELIEF ABOUT THE WEIGHT AND EFFECT OF THE  
02:27:09 22 EVIDENCE SIMPLY TO REACH A VERDICT.

02:27:14 23 BECAUSE YOU MUST BASE YOUR VERDICT ONLY ON THE EVIDENCE  
02:27:18 24 RECEIVED IN THE CASE, AND ON THESE INSTRUCTIONS, I REMIND YOU  
02:27:22 25 THAT YOU MUST NOT BE EXPOSED TO ANY OTHER INFORMATION ABOUT THE

02:27:25 1 CASE OR TO THE ISSUES IT INVOLVES, EXCEPT FOR DISCUSSING THE  
02:27:29 2 CASE WITH YOUR FELLOW JURORS DURING YOUR DELIBERATIONS. DO NOT  
02:27:35 3 COMMUNICATE WITH ANYONE IN ANY WAY AND DO NOT LET ANYONE ELSE  
02:27:39 4 COMMUNICATE WITH YOU IN ANY WAY ABOUT THE MERITS OF THE CASE OR  
02:27:42 5 ANYTHING TO DO WITH IT.

02:27:43 6 THIS INCLUDES DISCUSSING THE CASE IN PERSON, IN WRITING,  
7 BY PHONE OR ELECTRONIC MEANS, VIA E-MAIL, VIA TEXT MESSAGING,  
8 OR ANY INTERNET CHAT ROOM, BLOG, WEBSITE, OR APPLICATION,  
9 INCLUDING BUT NOT LIMITED TO FACEBOOK, YOUTUBE, TWITTER,  
10 INSTAGRAM, LINKEDIN, SNAPCHAT, OR ANY OTHER FORMS OF SOCIAL  
11 MEDIA.

02:28:07 12 THIS APPLIES TO COMMUNICATING WITH YOUR FAMILY MEMBERS,  
02:28:10 13 YOUR EMPLOYER, THE MEDIA OR PRESS, AND THE PEOPLE INVOLVED IN  
02:28:14 14 THE TRIAL.

02:28:15 15 IF YOU ARE ASKED OR APPROACHED IN ANY WAY ABOUT YOUR JURY  
02:28:19 16 SERVICE OR ANYTHING ABOUT THIS CASE, YOU MUST RESPOND THAT YOU  
02:28:22 17 HAVE BEEN ORDERED NOT TO DISCUSS THE MATTER AND TO REPORT THE  
02:28:26 18 CONTACT TO THE COURT.

02:28:29 19 DO NOT READ, WATCH, OR LISTEN TO ANY NEWS OR MEDIA  
02:28:32 20 ACCOUNTS OR COMMENTARY ABOUT THE CASE OR ANYTHING TO DO WITH  
02:28:36 21 IT.

02:28:36 22 DO NOT DO ANY RESEARCH, SUCH AS CONSULTING DICTIONARIES,  
02:28:40 23 SEARCHING THE INTERNET, OR USING OTHER REFERENCE MATERIALS.  
02:28:43 24 AND DO NOT MAKE ANY INVESTIGATION OR IN ANY OTHER WAY TRY IT  
02:28:51 25 LEARN ABOUT THE CASE ON YOUR OWN.

DO NOT VISIT OR VIEW ANY PLACE DISCUSSED IN THE CASE AND  
DO NOT USE INTERNET PROGRAMS OR OTHER DEVICES TO SEARCH FOR OR  
VIEW ANY PLACE DISCUSSED DURING THE TRIAL.

ALSO, DO NOT DO ANY RESEARCH ABOUT THIS CASE, THE LAW, OR  
THE PEOPLE INVOLVED, INCLUDING THE PARTIES, THE WITNESSES OR  
THE LAWYERS, UNTIL YOU HAVE BEEN EXCUSED AS JURORS.

IF YOU HAPPEN TO READ OR HEAR ANYTHING TOUCHING ON THE  
CASE, IN THE MEDIA, TURN AWAY AND REPORT IT TO ME AS SOON AS  
POSSIBLE.

THESE RULES PROTECT EACH PARTY'S RIGHTS TO HAVE THIS CASE  
DECIDED ONLY ON THE EVIDENCE THAT HAS BEEN PRESENTED HERE IN  
COURT. WITNESSES HERE IN COURT TAKE AN OATH TO TELL THE TRUTH  
AND THE ACCURACY OF THEIR TESTIMONY IS TESTED THROUGH THE TRIAL  
PROCESS.

IF YOU DO ANY RESEARCH OR INVESTIGATION OUTSIDE THE  
COURTROOM, OR GAIN ANY INFORMATION THROUGH IMPROPER  
COMMUNICATIONS, THEN YOUR VERDICT MAY BE INFLUENCED BY  
INACCURATE, INCOMPLETE OR MISLEADING INFORMATION THAT HAS NOT  
BEEN TESTED BY THE TRIAL PROCESS.

EACH OF THE PARTIES IS ENTITLED TO A FAIR TRIAL BY AN  
IMPARTIAL JURY, AND IF YOU DECIDE THE CASE BASED ON INFORMATION  
NOT PRESENTED IN COURT, YOU WILL HAVE DENIED THE PARTIES A FAIR  
TRIAL.

REMEMBER, YOU HAVE TAKEN AN OATH TO FOLLOW THE RULES AND  
IT IS VERY IMPORTANT THAT YOU FOLLOW THESE RULES. A JUROR WHO

02:30:19 1 VIOLATES THESE RESTRICTIONS JEOPARDIZES THE FAIRNESS OF THE  
02:30:23 2 PROCEEDINGS. IF ANY JUROR IS EXPOSED TO ANY OUTSIDE  
02:30:26 3 INFORMATION, PLEASE NOTIFY THE COURT IMMEDIATELY.

02:30:32 4 IF IT BECOMES NECESSARY DURING YOUR DELIBERATIONS TO  
02:30:35 5 COMMUNICATE WITH ME, YOU MAY SEND A NOTE THROUGH THE MARSHAL,  
02:30:39 6 SIGNED BY YOUR PRESIDING JUROR OR BY ONE OR MORE MEMBERS OF THE  
02:30:43 7 JURY.

02:30:44 8 NO MEMBER OF THE JURY SHOULD EVER ATTEMPT TO COMMUNICATE  
02:30:47 9 WITH ME, EXCEPT BY A SIGNED WRITING. I WILL COMMUNICATE WITH  
02:30:52 10 ANY MEMBER OF THE -- I WILL COMMUNICATE WITH ANY MEMBER OF THE  
02:30:59 11 JURY ON ANYTHING CONCERNING THE CASE ONLY IN WRITING OR HERE IN  
02:31:03 12 OPEN COURT.

02:31:04 13 IF YOU SEND OUT A QUESTION, I WILL CONSULT WITH THE  
02:31:06 14 PARTIES BEFORE ANSWERING IT, WHICH MAY TAKE SOME TIME. YOU MAY  
02:31:11 15 CONTINUE YOUR DELIBERATIONS WHILE WAITING FOR THE ANSWER TO ANY  
02:31:14 16 QUESTION.

02:31:15 17 REMEMBER THAT YOU ARE NOT TO TELL ANYONE, INCLUDING ME,  
02:31:18 18 HOW THE JURY STANDS, NUMERICALLY OR OTHERWISE, UNTIL AFTER YOU  
02:31:22 19 HAVE REACH HAPPENED A UNANIMOUS VERDICT OR HAVE BEEN  
02:31:26 20 DISCHARGED.

02:31:26 21 DO NOT DISCLOSE ANY VOTE COUNT IN ANY NOTE TO THE COURT.

02:31:34 22 A VERDICT FORM HAS BEEN PREPARED FOR YOU. AFTER YOU HAVE  
02:31:37 23 REACHED UNANIMOUS AGREEMENT ON A VERDICT, YOUR PRESIDING JUROR  
02:31:41 24 SHALL COMPLETE THE VERDICT FORM ACCORDING TO YOUR  
02:31:43 25 DELIBERATIONS, SIGN AND DATE IT AND ADVISE THE CLERK THAT YOU

02:31:46 1 ARE READY TO RETURN TO THE COURTROOM.

02:31:50 2 ALL RIGHT. LET ME DISCUSS A NUMBER OF THINGS WITH YOU TO  
02:31:53 3 BE A LITTLE MORE DESCRIPTIVE OF YOUR JOB IN THE JURY ROOM.

02:31:57 4 IN JUST A FEW MINUTES, I WILL EXCUSE YOU TO THE JURY ROOM.  
02:32:00 5 NOW YOU ARE FAMILIAR WITH THE ROOM, YOU HAVE BEEN THERE OVER  
02:32:03 6 THE LAST TWO WEEKS AS A PLACE TO LEAVE YOUR THINGS AND TO  
02:32:06 7 GATHER.

02:32:07 8 WHILE YOU ARE DELIBERATING, THE DOOR TO THE JURY ROOM WILL  
02:32:10 9 BE CLOSED. NO ONE MAY ENTER THE JURY ROOM EXCEPT THE EIGHT  
02:32:15 10 JURORS.

02:32:15 11 NOW, MS. SALINAS-HARWELL IS GOING TO BRING SOME THINGS IN  
02:32:20 12 TO YOU TO BEGIN WITH BECAUSE THOSE ARE THINGS YOU NEED AND  
02:32:23 13 SHE'S GOING TO SET UP THE EXHIBITS FOR YOU ON THE A COMPUTER.  
02:32:26 14 BUT OTHERWISE, YOU ARE NOT TO LET ANYONE IN THE ROOM. AND IF  
02:32:30 15 SOMEONE ELSE IS IN THE ROOM, INCLUDING MS. SALINAS-HARWELL, YOU  
02:32:33 16 ARE NOT TO DELIBERATE, DISCUSS THE CASE IN ANY WAY AMONG  
02:32:36 17 YOURSELVES OR ASK HER ANY QUESTIONS.

02:32:38 18 IN ADDITION TO THAT, THE UNITED STATES MARSHAL COURT  
02:32:42 19 SECURITY OFFICER WILL BE POSTED OUTSIDE YOUR DOOR. SO THAT HAS  
02:32:47 20 TWO EFFECTS.

02:32:48 21 FIRST, IT PROTECTS YOUR DELIBERATIONS SO NO ONE CAN COME  
02:32:51 22 IN. SECOND, IT PROTECTS YOUR DELIBERATIONS SO NO ONE CAN COME  
02:32:55 23 OUT. SO I NEED TO BE SURE THAT IF YOU ARE DELIBERATING, THAT  
02:33:01 24 ALL OF YOU ARE IN THE ROOM.

02:33:03 25 AND SO YOU ARE IN CHARGE OF YOUR SCHEDULE. I'M GOING TO

02:33:08 1 ASK THAT YOU WORK OUR NORMAL COURT DAY, SO THAT YOU CAN MOVE  
02:33:12 2 ALONG TO CONCLUDE THIS CASE IN AN EFFICIENT MANNER. BUT YOU  
02:33:18 3 MAY TAKE BREAKS AND YOUR LUNCH BREAK WHENEVER IT'S APPROPRIATE.

02:33:23 4 IF SOMEONE NEEDS TO MAKE A PHONE CALL OR LOOK AT THEIR  
02:33:27 5 E-MAIL, YOU HAVE TO TAKE A BREAK, IT'S COMPLETELY FINE.  
02:33:30 6 EVERYONE LEAVES THE JURY ROOM. THE COURT SECURITY OFFICER  
02:33:33 7 KNOWS THAT. YOU GO OUT IN THE HALLWAY, YOU TAKE YOUR BREAK,  
02:33:37 8 YOU LET HIM OR HER KNOW WHEN YOU ARE COMING BACK, THAT'S FINE.

02:33:41 9 NO ELECTRONIC DEVICES CAN BE USED IN THE JURY ROOM. NOW,  
02:33:45 10 MANY JUDGES CONFISCATE ELECTRONIC DEVICES DURING DELIBERATIONS.  
02:33:50 11 I'VE NEVER DONE IT, AND I'VE NEVER HAD A PROBLEM. BUT I'M  
02:33:54 12 GOING TO ASK EACH OF YOU TO BE AWARE OF WHAT YOUR FELLOW JURORS  
02:33:58 13 ARE DOING, AND IF YOU SEE ANYONE EVEN LOOKING AT A TEXT MESSAGE  
02:34:01 14 WHILE YOU ARE IN THE JURY ROOM, I NEED TO KNOW IMMEDIATELY.  
02:34:04 15 AND I WILL TAKE ALL OF YOUR DEVICES AWAY FROM ALL OF YOU WHILE  
02:34:08 16 YOU ARE DELIBERATING.

02:34:09 17 I HAVE BEEN DOING THIS FOR OVER 15 YEARS AND I'VE NEVER  
02:34:13 18 HAD TO CONFISCATE, I KNOW YOU WON'T LET ME DOWN ON THIS AND I  
02:34:16 19 KNOW NONE OF YOU WANTS TO BE PUTTING YOUR PHONES IN A BOX FOR  
02:34:20 20 THE MARSHAL WHILE YOU ARE IN THERE, SO I'M SURE THAT WILL BE  
02:34:23 21 FINE.

02:34:24 22 LET ME TELL YOU ABOUT THE EXHIBITS. YOU'VE NOTICED THERE  
02:34:27 23 ARE A FEW OF THEM HERE AND WE'VE DEALT WITH THEM IN PAPER FORM  
02:34:30 24 THROUGHOUT THE TRIAL FOR THE WITNESSES. YOU'VE SEEN THEM ON A  
02:34:34 25 SCREEN. AND I BELIEVE YOU HAVE CERTAIN EXHIBITS IN YOUR

02:34:37 1 BINDERS, ALTHOUGH I DON'T HAVE A BINDER BECAUSE I DON'T NEED TO  
02:34:41 2 SEE THAT.

02:34:41 3 WHEN YOU ARE IN THE JURY ROOM, THERE WILL BE A COMPUTER  
02:34:45 4 THAT ONLY ACCESSES THE EXHIBITS, IT'S NOT AN INTERNET-CONNECTED  
02:34:51 5 COMPUTER. AND YOU WILL HAVE A LIST OF ALL OF THE EXHIBITS  
02:34:55 6 ADMITTED. AND SO YOU CAN HAVE ACCESS TO ALL OF THE EXHIBITS.

02:35:01 7 IF YOU FIND THAT THERE IS AN EXHIBIT YOU WOULD LIKE TO SEE  
02:35:04 8 IN PAPER FORM, PLEASE SEND ME A NOTE, BECAUSE GUESS WHAT, I'VE  
02:35:08 9 GOT THEM ALL HERE, BUT IF I SEND ALL THESE EXHIBITS INTO THE  
02:35:11 10 JURY ROOM YOU WON'T FIT IN THE JURY ROOM.

02:35:15 11 SO I LEAVE THAT TO YOU, DON'T HESITATE TO ASK ME FOR THAT.

02:35:19 12 NOW I ALSO MENTIONED THAT YOU ARE GOING TO HAVE THE JURY  
02:35:23 13 INSTRUCTIONS IN THE JURY ROOM. I GENERALLY SEND IN TWO COPIES  
02:35:26 14 OF THE FULL SET OF JURY INSTRUCTIONS. BUT IF YOU WANT MORE,  
02:35:30 15 JUST LET ME KNOW. YOU HEARD ME READ THEM, YOU KNOW IT'S A BIG  
02:35:33 16 LIST. SO IF YOU WANT MORE COPIES, LET ME KNOW.

02:35:36 17 IF THERE'S A PARTICULAR INSTRUCTION YOU WANT MORE COPIES  
02:35:39 18 OF, YOU LET ME KNOW THAT. IT'S UP TO YOU. AND YOU'VE SEEN --  
02:35:44 19 YOU'VE LISTENED TO ALL THE INSTRUCTIONS.

02:35:46 20 NOW, YOU REMEMBER THAT I READ SOME INSTRUCTIONS AT THE  
02:35:49 21 BEGINNING AND I READ SOME TODAY. SO ALTHOUGH IT'S ONE SET OF  
02:35:53 22 INSTRUCTIONS, YOU WILL SEE THAT THERE'S A PAGE BREAK FOR THE  
02:35:56 23 PRELIMINARY INSTRUCTIONS AND THE FINAL ONES. THAT JUST MEANS I  
02:36:00 24 READ THEM FIRST, I READ THEM LAST, THERE'S NOTHING ELSE ABOUT  
02:36:03 25 THAT. BUT YOU WILL HAVE ALL OF THOSE INSTRUCTIONS.

02:36:09 1 NOW LET ME TELL YOU A LITTLE BIT ABOUT THE VERDICT FORM.

02:36:15 2 BOTH OF THE LAWYERS SHOWED YOU ON THE SCREEN, PAGES AT A  
02:36:19 3 TIME FROM THE VERDICT FORM. IT'S A DOCUMENT, IT'S GOING TO BE  
02:36:23 4 STAPLED TOGETHER. AND IT HAS THE QUESTIONS THAT YOU SAW, THEY  
02:36:28 5 WENT BY A LITTLE BIT QUICKLY, AND BLANK SPACES FOR YOU TO MARK  
02:36:32 6 IT, IF AND WHEN YOU REACH A UNANIMOUS VERDICT.

02:36:36 7 NOW, WHEN YOU HAVE A QUESTION THAT IS YES OR NO, IT TAKES  
02:36:42 8 EIGHT VOTES TO VOTE YES, IT ALSO TAKES EIGHT VOTES TO VOTE NO.  
02:36:47 9 AND IF YOU ARE DIVIDED, YOU MARK NOTHING UNTIL AND UNLESS YOU  
02:36:52 10 CAN REACH EIGHT VOTES FOR ONE OR THE OTHER.

02:36:57 11 NOW THE VERDICT FORM STARTS AT NUMBER 1, THEY ALL DO, BUT  
02:37:01 12 THIS IS NOT RANDOM ACCESS. YOU DON'T SKIP ONE BECAUSE YOU  
02:37:05 13 CAN'T DECIDE AND GO TO THE NEXT. YOU STAY ON THE FIRST ONE  
02:37:08 14 UNTIL YOU CAN'T FINISH IT, WITH THE EXCEPTION THAT THERE'S THE  
02:37:12 15 COPYRIGHT QUESTIONS AND THE PATENT QUESTIONS.

02:37:15 16 SO YOU CAN DO -- IF YOU ARE UNABLE TO COMPLETE ALL OF THE  
02:37:20 17 QUESTIONS ON COPYRIGHT, YOU CAN STILL GO TO PATENT. IF YOU  
02:37:23 18 COMPLETE ALL OF THE QUESTIONS ON COPYRIGHT, YOU STILL GO TO  
02:37:27 19 PATENT. AND IT DESCRIBES THAT FOR YOU.

02:37:30 20 I'M ALSO GOING TO GIVE EACH OF YOU YOUR OWN PERSONAL PAPER  
02:37:36 21 COPY OF THE VERDICT FORM. PLUS, THERE WILL BE THE ORIGINAL  
02:37:43 22 OFFICIAL VERDICT FORM THAT YOUR PRESIDING JUROR WILL TAKE CARE  
02:37:47 23 OF. THAT ONE IS NOT TO BE MARKED UNTIL THERE'S A UNANIMOUS  
02:37:54 24 VOTE. BUT I WANT EACH OF YOU TO KNOW EXACTLY WHAT YOU ARE  
02:38:01 25 VOTING ON.



02:38:02 1 AND I HAVE ANOTHER REASON FOR YOU HAVING YOUR OWN COPY,  
02:38:06 2 WHICH I WANT YOU TO BRING BACK INTO THE COURTROOM AT THE END OF  
02:38:08 3 THE TRIAL. THE ATTORNEYS HAVE THE RIGHT -- THE PARTIES HAVE  
02:38:09 4 THE RIGHT TO ASK EACH OF YOU TO STATE IN OPEN COURT HOW YOU  
02:38:12 5 VOTED ON EACH QUESTION.

02:38:15 6 IN EVERY CASE I'VE EVER HAD, THE PARTIES ASK FOR WHAT'S  
02:38:18 7 CALLED POLLING OF THE JURY. AND SO I WANT TO BE SURE THAT WHEN  
02:38:23 8 I ASK YOU THE QUESTION AND HOW YOU VOTED, THAT YOU KNOW HOW YOU  
02:38:25 9 VOTED.

02:38:26 10 SO YOU CAN MARK YOUR PERSONAL ONE ANY WAY YOU WANT, BUT I  
02:38:30 11 WANT TO MAKE SURE THAT YOU UNDERSTAND THAT AT THE END OF THE  
02:38:34 12 CASE, YOU MAY BE ASKED TO STATE IN OPEN COURT HOW YOU VOTED ON  
02:38:38 13 EACH QUESTION, AND I WANT TO GIVE YOU THE BEST OPPORTUNITY TO  
02:38:43 14 BE ABLE TO ACCURATELY TELL US WHAT YOUR VOTE IS. SO THAT'S THE  
02:38:46 15 PURPOSE OF THAT.

02:38:46 16 BUT FOR THE ONE OF YOU WHO IS ELECTED PRESIDING JUROR,  
02:38:50 17 THAT ONE WE KEEP IN, I DON'T KNOW WHETHER WE PUT IT, I THINK IN  
02:38:54 18 A BINDER, DON'T MARK IT UNTIL YOU'VE GOT UNANIMOUS ON THE ONE  
02:38:59 19 ANSWER OR THE OTHER.

02:39:00 20 AND THEN THAT ONE WILL STAY CLEAN, BUT THE OTHERS YOU CAN  
02:39:04 21 MARK ANY WAY THAT YOU WANT.

02:39:11 22 I THINK THAT PROBABLY TAKES CARE OF EVERYTHING. NOW, I  
02:39:15 23 NEVER XEROX THIS UNTIL I SEND YOU IN BECAUSE SOMETIMES I HAVE  
02:39:21 24 TO MAKE CHANGES IN THE INSTRUCTIONS AS I GO ALONG. THESE I  
02:39:24 25 DIDN'T CHANGE. WE HAVE A LOT OF XEROXES TO DO, IT'S GOING TO

02:39:28 1 TAKE A LITTLE BIT OF TIME. BUT AS I SAID, IN THE JURY  
02:39:30 2 INSTRUCTIONS, THE FIRST THING YOU ARE GOING TO DO IS ELECT YOUR  
02:39:33 3 PRESIDING JUROR. IT'S COMPLETELY UP TO YOU, ANY ONE OF YOU MAY  
02:39:38 4 SERVE AS A PRESIDING JUROR, AND IT'S THE CHOICE OF THE GROUP.  
02:39:42 5 BUT LET ME MAKE A FEW SUGGESTIONS AS YOU ARE CONSIDERING IT.

02:39:45 6 THE JOB OF THE PRESIDING JURY OUR IS TO ORGANIZE THE  
02:39:48 7 DISCUSSION, TO MAKE SURE THAT THE DISCUSSION IS FAIR TO  
02:39:51 8 EVERYONE THERE.

02:39:54 9 AND BY THAT I MEAN, WE'VE ALL BEEN IN GROUPS BEFORE,  
02:39:56 10 WHETHER IT WAS IN SCHOOL, SOMETIMES IT'S AT JOBS, SOMETIMES  
02:40:00 11 IT'S JUST AT GATHERING WHERE PEOPLE ARE HAVING A DISCUSSION,  
02:40:02 12 AND THERE ARE ALWAYS THE EAGER BEAVERS WHO ARE GOING TO SAY  
02:40:05 13 WHAT'S ON THEIR MIND NO MATTER WHAT. I MEAN, THEY'VE GOT SHARP  
02:40:10 14 ELBOWS, YOU KNOW THE TYPE.

02:40:11 15 BUT THEN THERE ARE PEOPLE WHO ARE VERY THOUGHTFUL AND  
02:40:13 16 DON'T CHOOSE TO SPEAK UNTIL IDEAS ARE REALLY FORMULATED. AND  
02:40:17 17 IF SOMEONE WITH SHARP ELBOWS SPEAKS UP BEFORE THEY GET TO, SOME  
02:40:24 18 PEOPLE SAY AH, NEVER MIND.

02:40:25 19 SO A GOOD PRESIDING JUROR IS GOING TO NOTICE WHEN THAT  
02:40:28 20 QUIETER JUROR HAS MADE SOME GESTURE OF WANTING TO SPEAK AND  
02:40:32 21 MAKE A NOTE OF IT AND COME BACK TO THAT PERSON TO CALL TO THAT  
02:40:36 22 PERSON TO GIVE THEM THE FLOOR TO SPEAK.

02:40:38 23 THAT IS THE KIND OF PRESIDING JUROR YOU MAY WISH TO  
02:40:41 24 CONSIDER. BUT IT'S COMPLETELY UP TO YOU. I JUST WANT TO MAKE  
02:40:45 25 SURE THAT EACH OF YOU HAS AN OPPORTUNITY TO SAY WHAT YOU WANT

02:40:47 1 AND THAT THE DISCUSSION IS ORGANIZED AND THOROUGH. BUT WHAT  
02:40:52 2 THAT MEANS IS BEHIND YOUR CLOSED DOOR, AND I'M NOT PART OF  
02:40:55 3 THAT.

02:40:55 4 THE LAST THING I WANT TO TALK ABOUT ARE QUESTIONS THAT YOU  
02:40:58 5 MIGHT SEND OUT. TYPICALLY IN THE PACKET OF MATERIALS, I SEND  
02:41:02 6 YOU THREE BLANK QUESTION FORMS. SO AT THE TOP IS FOR YOUR  
02:41:07 7 QUESTION, WHICH I NEED IN WRITING. AND THERE ARE BLANK LINES  
02:41:11 8 FOR IT. PLEASE JUST GIVE ME ONE QUESTION PER PAGE. I WILL  
02:41:15 9 GIVE YOU GENERALLY THE ANSWER IN WRITING ON THE BOTTOM HALF.

02:41:19 10 EVERY ONCE IN A WHILE THE QUESTION REQUIRES YOU TO COME  
02:41:22 11 BACK INTO THE COURTROOM, AND IF THAT'S THE CASE, THE ANSWER  
02:41:26 12 WILL BE, I WOULD LIKE YOU TO RETURN TO THE COURTROOM. AND THAT  
02:41:28 13 WILL BE FINE.

02:41:29 14 THE REASON I WANT THE QUESTIONS ON SEPARATE PAGES IS I  
02:41:33 15 WANT THE RECORD TO BE CLEAR WHAT MY RESPONSE IS. AND I WANT TO  
02:41:36 16 HAVE ENOUGH ROOM TO GIVE IT IF IT'S GOING TO BE LENGTHY.

02:41:41 17 SO THE FACT THAT I GIVE YOU THREE BLANK QUESTION FORMS  
02:41:44 18 DOESN'T MEAN YOU SHOULD HAVE THREE QUESTIONS, YOU MIGHT HAVE  
02:41:46 19 NONE, YOU MIGHT HAVE MORE. IT'S JUST MY STANDARD PACKET. I  
02:41:50 20 DON'T MEAN ANYTHING BY IT EXCEPT TO GET YOU STARTED.

02:41:53 21 NOW THE PRESIDING JUROR CAN WRITE THE QUESTION OUT. BUT  
02:41:56 22 THE PRESIDING JUROR CANNOT PREVENT THE JURY FROM SENDING  
02:42:00 23 QUESTIONS OUT. AND YOU HEARD THAT IN THE INSTRUCTION.

02:42:04 24 SO I WANT TO BE CLEAR THAT IF THERE'S A QUESTION THAT  
02:42:07 25 CANNOT BE CONSIDERED AMONG YOURSELVES, ANY JUROR MAY SEND A

02:42:10 1 QUESTION OUT, AND THAT CAN BE AT ANY TIME.

02:42:14 2 AS I SAID IN THE INSTRUCTION, PLEASE KEEP WORKING. THE  
02:42:18 3 LAWYERS NEED TO COME IN, WE NEED TO DISCUSS IT, AND SOMETIMES  
02:42:23 4 IT TAKES ME SOME TIME TO DEVELOP THE ANSWER PROPERLY. IT  
02:42:29 5 DOESN'T MEAN THE ANSWER IS GOING TO BE LONG, IT JUST MAY BE  
02:42:32 6 DIFFICULT. SO KEEP WORKING.

02:42:33 7 AND IF I FIND IT'S GOING TO TAKE ME SOME TIME, EVERY ONCE  
02:42:37 8 IN A WHILE I REALIZE I NEED TO GIVE YOU THAT INFORMATION, I  
02:42:40 9 MIGHT TELL YOU THIS IS GOING TO TAKE X AMOUNT OF TIME.

02:42:43 10 SO I WILL JUST KEEP YOU INFORMED THAT WAY. BUT I DON'T  
02:42:45 11 WANT YOU WAITING. AND SO YOU CAN DO THAT.

02:42:49 12 NOW, WHEN YOU TAKE YOUR BREAKS AND AS I SAID, IT'S  
02:42:52 13 COMPLETELY UP TO YOU, TAKE YOUR LUNCH BREAKS, BRING YOUR LUNCH  
02:42:56 14 IN, WHATEVER YOU WANT TO DO, YOU CAN'T DELIBERATE WHILE YOU ARE  
02:42:59 15 OUT OF THE JURY ROOM. AND IF TWO OR THREE OF YOU GO HAVE LUNCH  
02:43:04 16 TOGETHER, THAT'S GREAT, TALK AMONG YOURSELVES AS YOU HAVE BEEN  
02:43:07 17 DOING, BUT YOU CAN'T DELIBERATE. YOU CAN'T TALK ABOUT THE  
02:43:11 18 EVIDENT, YOU CAN'T TALK ABOUT THE CASE, JUST LIKE I'VE SAID,  
02:43:14 19 EVEN THOUGH YOU ARE DELIBERATING JURORS. SO PLEASE KEEP THAT  
02:43:18 20 IN MIND.

02:43:19 21 NOW WHEN YOU ARE IN THE HALLWAYS IN THE COURT, YOU SEE  
02:43:21 22 THERE ARE A LOT OF PEOPLE HERE WHO ARE INTERESTED IN THE CASE,  
02:43:24 23 YOU MAY THINK YOU ARE OVERHEARING SOMETHING ABOUT THE CASE,  
02:43:27 24 PLEASE WALK AWAY IF YOU THINK YOU ARE HEARING SOMETHING.

02:43:31 25 WEAR YOUR JURY BADGES PLEASE WHILE YOU ARE IN THE

02:43:34 1 COURTHOUSE SO THAT OTHERS CAN RECOGNIZE THAT YOU ARE A  
02:43:38 2 DELIBERATING JUROR AND THEY SHOULD WALK AWAY FROM YOU. AND  
02:43:41 3 PEOPLE UNDERSTAND THAT, BUT CLOSE QUARTERS, COLD OUTSIDE, YOU  
02:43:45 4 KNOW, IT GETS TO BE SOMETIMES PEOPLE OVERHEAR THINGS THEY ARE  
02:43:48 5 NOT SUPPOSED TO. SO WE WILL KEEP THAT IN MIND AS WELL.

02:43:52 6 SO WITH THAT, LADIES AND GENTLEMEN, AND COUNSEL, IF  
02:43:54 7 THERE'S NO REASON FOR ME NOT TO EXCUSE THE JURY TO  
02:43:59 8 DELIBERATIONS NOW, I WOULD LIKE TO DO THAT.

02:44:01 9 MR. VAN NEST: YOU MAY, YOUR HONOR. THANK YOU.

02:44:02 10 MR. NELSON: THAT WOULD BE GREAT, YOUR HONOR.

02:44:03 11 THE COURT: THANK YOU.

02:44:04 12 ALL RIGHT. TAKE YOUR NOTEBOOKS AND YOUR BINDERS AND YOUR  
02:44:09 13 BADGES. AND I WILL BE HERE ALL DAY WITH YOU, BUT YOU WON'T SEE  
02:44:13 14 ME UNLESS YOU COME BACK IN THE COURTROOM.

02:44:16 15 (JURY OUT AT 2:44 P.M.)

02:44:19 16 THE COURT: ALL RIGHT. PLEASE BE SEATED, EVERYONE.

02:44:49 17 WE ARE BACK ON THE RECORD OUTSIDE THE PRESENCE OF THE  
02:44:52 18 JURY.

02:44:52 19 ALL RIGHT. COUNSEL, I WILL BE IN TOUCH WITH YOU AS  
02:44:57 20 NEEDED. I DO REQUIRE THAT YOU AND YOUR CLIENTS BE NO MORE THAN  
02:45:01 21 20 MINUTES FROM YOUR SEAT IN THE COURTROOM THROUGHOUT THE  
02:45:04 22 DELIBERATIONS. AND I WILL ASK THAT YOU LEAVE AT LEAST ONE CELL  
02:45:09 23 PHONE NUMBER, IF NOT TWO, SO THAT WE CAN REACH YOU IMMEDIATELY  
02:45:13 24 IF THE JURY HAS ANY QUESTIONS FOR YOU.

02:45:17 25 AND YOU KNOW, THE ONLY THING I ASK IS THAT YOU MAKE SURE

02:45:20 1 YOU HAVE RECEPTION, WHEREVER YOU ARE, FOR THOSE CELL PHONES.

02:45:25 2 BUT YOU KNOW THE DRILL, YOU HAVE BEEN THROUGH IT MANY TIMES.

02:45:28 3 ANYTHING ELSE FOR THE RECORD BEFORE WE RECESS?

02:45:30 4 MR. VAN NEST: NO, YOUR HONOR. THANK YOU.

02:45:31 5 MR. NELSON: NOTHING YOUR HONOR.

02:45:33 6 THE COURT: ALL RIGHT.

02:45:34 7 THEN MS. SALINAS-HARWELL WILL BE BACK IN A MINUTE. YOU

02:45:37 8 CAN GIVE HER THOSE CELL PHONE NUMBERS OR WRITE THEM DOWN AND

02:45:40 9 LEAVE THEM ON HER DESK. I KNOW SHE WILL JUST BE A MOMENT.

02:45:44 10 ALL RIGHT. THANK YOU ALL.

02:45:45 11 MR. VAN NEST: THANK YOU, YOUR HONOR.

02:45:46 12 MR. NELSON: THANK YOU, YOUR HONOR.

02:45:50 13 (THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

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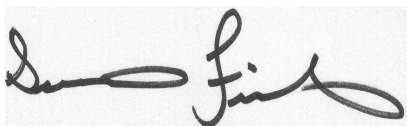
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**CERTIFICATE OF REPORTER**

I, THE UNDERSIGNED OFFICIAL COURT  
REPORTER OF THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH  
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY  
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,  
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND  
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS  
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS  
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED  
TRANSCRIPTION TO THE BEST OF MY ABILITY.

A handwritten signature in black ink, appearing to read "Summer A. Fisher", is written over a light gray rectangular background.

SUMMER A. FISHER, CSR, CRR  
CERTIFICATE NUMBER 13185

DATED: 12/12/16